Commonwealth of Massachusetts
Supreme Judicial Court

SJC-13893

ARCANGELO CELLA, TERESA DEL SIGNORE, KATHERINE HOREY, and SUSAN M. RENEFREW,
Plaintiffs-Appellants,

v.

ANDREA J. CAMPBELL, in her official capacity as the Attorney General of the Commonwealth of Massachusetts, and WILLIAM F. GALVN, in his official capacity as the Secretary of the Commonwealth of Massachusetts,
Defendants-Appellees.

On Reservation and Report from the Supreme Judicial Court for Suffolk County

BRIEF OF *AMICI CURIAE* GREATER BOSTON CHAMBER OF COMMERCE, CHARLES RIVER REGIONAL CHAMBER, AND RETAILERS ASSOCIATION OF MASSACHUSETTS IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Stewart, *The Law of Initiative Referendum in Massachusetts*, 12 New England L. Rev. 455 (1977).....20, 25

Tom Guilfoyle, *FY2025 Tax Levies, Assessed Values and Tax Rates*, Mass. Div. of Local Services (Jan. 16, 2025), https://www.mass.gov/info-details/fy2025-tax-levies-assessed-values-and-tax-rates 28

U.S. Bureau of Labor Statistics, *Consumer Price Index Summary*, https://www.bls.gov/news.release/cpi.nr0.htm 35, 36

U.S. Bureau of Labor Statistics, *Consumer Price Index — June 2025* (July 15, 2025), https://www.bls.gov/news.release/archives/cpi_07152025.htm 28

U.S. Bureau of Labor Statistics, *Consumer Price Index — March 2026*, https://www.bls.gov/news.release/pdf/cpi.pdf.....36

Congressional Budget Office, *Differences Between the Traditional CPI and the Chained CPI* (Apr. 19, 2013), https://www.cbo.gov/publication/44088.....35

U.S. Bureau of Labor Statistics, *Frequently Asked Questions about the Chained Consumer Price Index for All Urban Consumers (C-CPI-U)*, https://www.bls.gov/cpi/additional-resources/chained-cpi-questions-and-answers.htm 35

WEBSTER'S COLLEGIATE DICTIONARY 687 (G&C Merriam Co. 1908) 19

William T. Pound, *Initiative and Referendum in the 21st Century: Final Report and Recommendations of the NCSL I&R Task Force*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 2002).....30

INTEREST OF *AMICI CURIAE*[1]

The Greater Boston Chamber of Commerce ("GBCC") is an independent, nonprofit organization representing the interests of a diverse membership of more than 1,300 small, mid-size and large businesses that span a variety of industries and sectors in Greater Boston.

GBCC is committed to driving the region's economic growth and prosperity by ensuring that it remains a competitive place to start, expand, and run a business. A crucial component of the Commonwealth's competitiveness is a stable housing market that attracts investment, grows the supply of quality housing, supports workforce growth, and provides residents across the income spectrum with access to affordable housing.

GBCC has many members that would be directly affected by the Rent Control Petition, including developers and owners of residential properties, property management companies, lenders and financial institutions with interests in residential property, and investors whose returns depend on market-rate rents. In

[1] Pursuant to Mass. R. App. P. 17, *amici* hereby state that: no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; no person, other than *amici* or its counsel, contributed money that was intended to fund preparing or submitting this brief; and neither *amici* nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

addition, GBCC's members include employers across all industries that depend on an adequate supply of rental housing to attract and retain workers in a competitive labor market. GBCC also has an institutional interest in protecting property rights and ensuring that the constitutional processes governing popular lawmaking are faithfully observed.

The Charles River Regional Chamber is a nonprofit organization serving as the regional chamber of commerce for the municipalities of Newton, Needham, Wellesley, Watertown and Brookline. The Chamber has a direct and substantial interest in policies that shape our local economy, workforce, and housing, representing a diverse array of businesses from multigenerational family businesses and multinational companies to start-ups, educational institutions and other nonprofits. These businesses are based in village and town centers, commercial districts, office parks and home offices throughout Boston's inner western suburbs.

Unlike rent stabilization frameworks adopted in a few municipalities in the Commonwealth and across the country, this petition contains no flexibility mechanisms or compensation provisions, an omission that threatens private property rights and should disqualify it from the ballot. Rent control is fundamentally at odds with the supply-side housing solutions our region requires. It will slow new housing construction, leaving the workers and young

professionals with fewer options to live here. As rental property values decline, the tax burden will shift onto homeowners, which will place the dream of homeownership further out of reach for many, impacting the Chamber's membership and its ability to attract and retain talent.

The Retailers Association of Massachusetts ("RAM") is a nonprofit association that is supported primarily by membership dues and fees. RAM's mission is to advocate on behalf of the retail industry before the Massachusetts Legislature, executive branch agencies, and the courts, to support fair and equitable conditions for the retail industry to operate in Massachusetts, and to promote the overall economic competitiveness of the Commonwealth. A stable housing market is essential to preserving the state's competitiveness as it invites increased investment in needed housing development, provides residents with a more affordable housing supply, and supports a growing workforce thereby allowing Massachusetts employers to attract and retain talent.

RAM's membership consists of thousands of retail businesses throughout the Commonwealth, from large national retailers to small, local, independent, and owner-operated businesses. As employers, they rely on a robust and affordable supply to compete for talent and have a direct interest in the petition's potential to depress housing production. Many also serve a key role in the housing development supply chain as sellers of housing materials, appliances, furniture and

home décor products depended upon by developers, or as installers of such products. RAM also has an institutional interest in preserving the integrity of the initiative petition process.

BACKGROUND

I. The Rent Control Petition

Since 1994, the Massachusetts Rent Control Prohibition Act has "broadly prohibit[ed] any regulatory scheme based upon or implementing rent control." G.L. c. 40P, § 2; St. 1994, c. 368, § 1. This prohibition reflects the Commonwealth's longstanding policy judgment "that the public is best served by free market rental rates for residential properties and by unrestricted home ownership." *Id.*

Petition 25-21 ("the Rent Control Petition") would repeal the Massachusetts Rent Control Prohibition Act in its entirety and replace it with a new Chapter 40P that imposes a cap on annual rent increases for covered dwelling units throughout the Commonwealth. The cap restricts any annual increase to the lesser of "the annual increase in the Consumer Price Index in any 12-month period or 5%," making it the strictest of the three existing statewide rent control caps in the country.[2] *See* Cal. Civ. Code § 1947.12(a)(1) (5% plus CPI or 10%, whichever is

[2] As discussed *infra* at 34-36, the petition does not specify the applicable index, the relevant geographic area, the measurement methodology, whether seasonal adjustment applies, or which month closes the 12-month window.

lower); Revised Code of Washington § 59.18.700(1)(a)(ii) (7% plus CPI or 10%, whichever is lower); Or. Rev. Stat. § 90.324(1) (7% plus CPI or 10%, whichever is lower).

The rent cap is calculated based on the rent charged as of January 31, 2026, freezing rents based on a rate set more than nine months before election day. Petition at § 3. Residential property owners who were not charging market rates as of that date are bound to their below-market rates with no mechanism for relief. For units that are vacant "on the date of adoption," the last rent amount charged serves as the base rent. *Id.* Where no prior rent exists or no rent has been charged within the past five years, the first amount charged following the "date of adoption" becomes the base rent. *Id.*

The rent cap applies to "covered dwelling units," defined broadly to encompass "all dwelling units leased for residential, but not commercial, use" that do not fall within one of five narrow exemptions.[3] Petition at § 2. The exemptions governing who is subject to the rent cap draw lines that do not track the distinctions one might expect. First, owner-occupied buildings with four or fewer units are exempt, Petition at § 2(a), but an owner of a single-family, two-family,

[3] The term "dwelling unit" is not defined in the petition, leaving uncertainty as to whether boarding houses, lodging houses, rooming houses, and sober housing fall within its scope.

three-family or four-family building who does not reside there receives no exemption. The petition does not exempt accessory dwelling units, which the Legislature sought to encourage by allowing them to be built by-right in all single-family zoning districts. *See* G.L. c. 40A, § 3, ¶ 11. Second, dwelling units subject to regulation by a public authority are exempt, Petition at § 2(b), though private owners who accept a single mobile housing voucher remain subject to the cap, leaving small private landlords more heavily regulated than public housing authorities operating hundreds or thousands of units.

Third, dwelling units rented to "transient guests" for fewer than 14 consecutive days are exempt, Petition at § 2(c), but the term "transient guests" is undefined, and the 14-day threshold is inconsistent with the Commonwealth's 31-day definition of a short-term rental for purposes of the state occupancy tax. *See* G.L. c. 64G, § 1. As a result, a rental of 14 to 31 days is simultaneously a short-term rental subject to the state occupancy tax and a long-term rental subject to the rent cap. Fourth, dwelling units in facilities operated "solely" for educational, religious, or non-profit purposes are exempt, Petition at § 2(d), a standard that inevitably will produce litigation over the purpose of such facilities and the applicability of the Dover Amendment. *See* G.L. c. 40A, § 3, ¶ 2.

Finally, units whose first certificate of occupancy was issued less than 10 years ago are exempt. Petition at § 2(e). This exemption does not consider

whether a unit has been so substantially renovated that a new certificate of occupancy was required. Accordingly, there is no incentive for residential property owners to undertake major improvements.

A violation of the Rent Control Petition constitutes an unfair and deceptive act under Chapter 93A. Petition at § 4. If a court finds that a residential property owner's violation was willful or knowing, or the owner refused to grant relief upon a demand letter in bad faith, the tenant would be entitled to recover not less than double and up to treble damages. G.L. c. 93A, § 9(2). The Attorney General may independently bring an enforcement action pursuant to G.L. c. 93A, § 4, seeking restitution, civil penalties of up to $5,000 per violation, and injunctive relief. Petition at § 4.

II. History of Rent Control in Massachusetts

Massachusetts does not write on a blank slate with respect to rent control. From 1970 through 1994, Boston, Cambridge, Brookline, and Somerville operated rent control regimes under the authority of the 1970 Rent Control Act, St. 1970, c. 842. Studies from that time period demonstrate that rent control led to a reduction in rental supply and a decrease in maintenance and upgrades to units.

Economist David Sims examined the effects of Massachusetts rent control using Boston Metropolitan Statistical Area data from the American Housing Survey spanning 1985 to 1998. Sims, *Out of Control: What Can We Learn from*

the End of Massachusetts Rent Control?, 61 J. Urban Econ. 129 (2007). Sims found that rent control "decrease[d] the quantity of rental units supplied, as well as rent and unit maintenance"—specifically, rent control was associated with a 6-7 percentage point change in the probability of a unit being available for rent, which when applied across all three cities suggested that rent control "kept thousands of units off the market." *Id.* at 143, 150. Further, units in decontrolled zones were almost 6 percentage points less likely to experience wear and tear—such as holes in walls or floors, chipped or peeling paint, plaster damage, and loose railings—than units subject to rent control. *Id.* at 144.

Sims's findings revealed a further problem: rent control did not reach the tenants it was designed to protect. "Only 26% of rent controlled apartments were occupied by renters in the bottom quartile of the household income distribution, while 30% of units were occupied by tenants in the top half of this distribution," meaning that rent-controlled units disproportionately benefited higher-income tenants. *Id.* at 148. In addition, Sims found that Hispanic and African-American households were underrepresented in rent-controlled housing, comprising only 12% of the rent-controlled population despite accounting for roughly one quarter of the population in the cities with rent control. *Id.*

The harmful effects of rent control are not unique to Massachusetts. When St. Paul, Minnesota enacted rent control in 2021, property values declined by 6 to 7

percent within three months—an aggregate loss of $1.57 billion to property owners—with a projected 4 percent shortfall in property tax revenue that would likely require either tax increases or cuts to city services. Ahern & Giacoletti, *Robbing Peter to Pay Paul? The Redistribution of Wealth Caused by Rent Control*, NBER Working Paper No. 30083, 2–3 (2022). And in San Francisco, a rent control expansion that resulted from a 1994 ballot initiative caused residential property owners to convert rental units to condos and redevelop buildings to escape coverage, leading to a 15 percentage point decline in the number of renters living in affected buildings and a 25 percentage point reduction in renters living in rent-controlled units relative to 1994 levels. Diamond, McQuade & Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 Am. Econ. Rev. 3365, 3366-3368 (2019).

It is against this backdrop that this Court considers the Rent Control Petition.

SUMMARY OF THE ARGUMENT

The delegates to the Constitutional Convention of 1917-1918 resolved that the people of the Commonwealth should have the power to initiate and make laws without the General Court's consent. At the same time, they understood the risk that the initiative process could become an instrument of oppressive or incompetent lawmaking. The delegates therefore built procedural and substantive safeguards into the initiative process to guard against those dangers. To enforce

these safeguards, the framers entrusted the Attorney General to act as "the gatekeeper for the initiative process," certifying that a proposed petition satisfies the Constitution's requirements before it may be submitted to the Legislature and the voters. *Bogertman v. Attorney General*, 474 Mass. 607, 611 (2016).

As set forth below, the Attorney General failed that gatekeeping function by certifying a petition that contains excluded matters and is not in proper form, and by preparing a summary that does not give voters a fair understanding of what they are being asked to approve.

First, the petition is excluded because it "relates to religion, religious practices or religious institutions." Amend. Art. 48, The Initiative, Part II, § 2. An initiative petition that directly references religious institutions and expressly provides for their special treatment falls within the religious exclusion regardless of whether the remainder of the measure is secular. The Attorney General's contrary argument improperly imports the "main purpose" or "incidentality" test—a doctrine developed exclusively for the "powers of courts" exclusion—into a context where it has no application. *See* pp. 19-25.

Second, the petition is inconsistent with the "right to receive compensation for private property appropriated to public use," guaranteed by Article 10 of the Declaration of Rights. Amend. Art. 48, The Initiative, Part II, § 2. The petition

repeals a 30-year statutory guarantee of market-rate compensation without providing any mechanism for relief. *See* pp. 26-29.

Third, the Attorney General's summary does not satisfy Article 48's requirement of fairness. The summary fails to inform voters of the petition's central features: that it repeals the existing law prohibiting rent control and replaces that law with a new statewide rent control scheme. *See* pp. 29-33.

Fourth, the petition's draftsmanship errors render it neither in proper form nor susceptible to a comprehensible summary, providing two independent grounds for the Attorney General to decline certification. The petition's operative provision—the cap on annual rent increases tied to the Consumer Price Index—is ambiguous because no single Consumer Price Index exists. The petition fails to specify not only the applicable index but also the relevant geographic area, the measurement methodology, whether seasonal adjustment applies, and which month closes the 12-month window. Because the petition does not define the rent cap calculation, the Attorney General did not prepare a comprehensible summary of it and a voter reading her summary would have no basis for understanding how the cap will be determined. *See* pp. 33-37.

ARGUMENT

I. The Rent Control Petition Is Excluded From the Initiative Process Because It Relates to Religion and Religious Institutions.

The Rent Control Petition is excluded from the initiative process because it expressly exempts "dwelling units in facilities operated solely for . . . religious . . . purposes" from the rent cap. Petition at § 2. Article 48 provides without qualification that "[n]o measure that relates to . . . religion, religious practices or religious institutions . . . shall be proposed by an initiative petition." Amend. Art. 48, The Initiative, Part II, § 2. The petition relates to religion and religious institutions on its face: it expressly refers to religion, confers preferential treatment on religious institutions, and does so only after a governmental determination that religion is the only purpose for which the facility exists.

Article 48 was written to be understood by the voters to whom it was submitted for ratification. *Buckley v. Sec'y of Commonwealth*, 371 Mass. 195, 199 (1976). Its words must therefore be read "according 'to the familiar and approved usage of the language.'" *Id.*, quoting *Yont v. Sec'y of the Commonwealth*, 275 Mass. 365, 366 (1931). At the time of Article 48's adoption, "relate" meant "[t]o have relation; to pertain; to refer." WEBSTER'S COLLEGIATE DICTIONARY 687 (G&C Merriam Co. 1908). Article 48's prohibition on a measure that "relates" to "religion, religious practices or religious institutions" therefore requires nothing more than an express reference to one of those subjects. Put another way, as this

Court stated in *Collins v. Sec'y of the Comm.*, 407 Mass. 837 (1990), "where a law 'by its terms deals with religion, religious practices, or religious institutions, it is excluded.'" *Id.* at 851, quoting Stewart*, The Law of Initiative Referendum in Massachusetts*, 12 New England L. Rev. 455, 481 (1977).[4]

The debates of the Constitutional Convention of 1917-1918 confirm that the delegates intended Article 48's religious exclusion to be applied broadly.[5] Mr. Churchill spoke directly to the point, expressing his "hope that no law affecting religion shall be the subject of popular debate upon an initiative petition." 2 Debates in the Massachusetts Constitutional Convention 1917-1918, 769 (1918) ("*2 Debates*"). Mr. Curtis agreed that "all religious subjects would be handled better by considering them before the Legislature than in the way of amendments to the Constitution by the initiative and making them the subject of general

[4] In the cited law review article, Stewart suggested that the religious exclusion "might well have to be applied to the language of the law or proposed law rather than its underlying intent or practical effect." *Id.* He articulated his proposed interpretation of the exclusion as follows: "If the measure by its terms deals with religion, religious practices, or religious institutions, it is excluded. If it, by its terms, deals in secular matters, but as a practical matter affects religious beliefs or practices, it would not be excluded." *Id.*

[5] "It is permissible to examine the debates of the Constitutional Convention for the purpose of ascertaining the views presented to the Convention and the understanding of its members, although the plain meaning of the words used in the Amendment cannot be thereby controlled." *Yont*, 275 Mass. at 369.

discussion by the people at large." *Id.* at 768. Mr. Anderson was more direct still: "religion has no place in politics at all." *Id.* at 769.

Until now, the Attorney General has shared this understanding of Article 48's religious exclusion. In *Collins,* the Attorney General took the position that "[a] law 'relates to' an [area], in the normal sense of the phrase, if it has connection with or reference to such a[n area]." *Attorney General's Collins Brief*, Add. 59, quoting *Commonwealth v. Morash*, 402 Mass. 287, 293-294 (1988), *rev'd on other grounds sub nom. Massachusetts v. Morash*, 109 S. Ct. 1668 (1989). The Attorney General reaffirmed that understanding in *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), stating that the exclusion for religious institutions was intended "to keep out of the initiative lawmaking process those proposals *affecting such institutions in any way*." *Attorney General's Wirzburger Brief*, Add. 109 (Emphasis added.).

The Rent Control Petition is plainly excluded under this standard. Any reference to religion in the text of an initiative petition is sufficient to trigger the exclusion,[6] but the petition's substance goes even further. By exempting residential property operated "solely for" religious purposes, the petition requires the government to analyze whether religion is the only purpose of the facility. If

[6] *See Attorney General's Collins Brief*, Add. 62 ("The issue before the Court should be fully resolved by merely noting that chapter 516 'refer[s] directly' to religious institutions and principles.").

the answer is in the affirmative, the petition then mandates differential treatment based on religious classification.

At the 1917-1918 Constitutional Convention, the delegates adopted the Anti-Aid Amendment to prevent public funds and property from being appropriated to religious or other private institutions. The delegates adopted Article 48's religious exclusion as the corollary of that same principle. As Mr. Parker observed, it is "perfectly in harmony with . . . the wise provisions of the anti-aid amendment finally so overwhelmingly adopted by this Convention." *2 Debates* at 788. A petition that exempts religious institutions from a broadly applicable statutory restriction singles them out for favorable treatment. It is exactly the kind of official entanglement with religious institutions both provisions were designed to prevent.

Collins confirms as much. There, this Court held that a referendum petition to amend G.L. c. 151B, the state antidiscrimination law, to include sexual orientation as a protected class was excluded from the referendum process because it included an exemption for religious institutions and certain affiliated charitable or educational organizations.[7] 407 Mass. 838-852. Although the religious exemption was just one aspect of an otherwise secular law prohibiting

[7] Article 48's referendum provision uses identical language to the initiative petition provision, excluding any law that relates to "religion, religious practices or religious institutions." Amend. Art. 48, The Referendum, Part III, § 2.

discrimination in housing, employment, credit, and public accommodations, the Court concluded that the petition nevertheless fell within the religious exclusion because it "alter[ed] the legal status of religious institutions with respect to discrimination" and "directly provide[d] for special treatment" of religious institutions. *Id.* at 847-848.

The Attorney General argues that the petition is not subject to the religious exclusion because its "main purpose, limiting rent increases for most residential units in the Commonwealth, is completely unrelated to religion."[8] Appellee Br. 21. This argument attempts to import, without acknowledgment, the "main design" or "incidentality" test developed in the context of Article 48's exclusion for measures relating to "powers, creation, or abolition of courts" into the religious exclusion.[9] Such a position finds no support in the text of Article 48, the debates of the Constitutional Convention, or, for that matter, logic. Worse still, it conflicts with the position taken by the Attorney General in *Collins*: that "[n]o other exclusion

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[8] The Attorney General also hangs her hat on the Court's use of the word "distinctively" in *Opinion of the Justices*, *see* Appellee Br. at 17, but fails to acknowledge the Court's statement in *Collins* that a measure is excluded where it "by its terms" deals with religion, religious practices, or religious institutions. 407 Mass. at 851. In any case, the Rent Control Petition relates distinctively to religious institutions by directly referencing them, requiring religion to be their "sole" purpose, and providing differential treatment based on religious status.

[9] In *Collins*, this Court expressly declined to reach whether the "main design" or "incidentality" test applies to the religious exemption. 407 Mass. at 851, n.10.

has the same potential to eviscerate Article 48, and so application of the incidentality test to any other exclusion is neither precedented nor necessary." *Attorney General's Collins Brief*, Add. 83.

The "main design" or "incidentality" test asks whether a measure's effect on the powers of courts is part of its "main design" or merely "incidental and subsidiary." *Horton v. Attorney General*, 269 Mass. 503, 511 (1930). This test appears nowhere in the text of Article 48 but was created by this Court out of practical necessity to prevent Article 48's "powers of courts" exclusion from gutting the initiative process. As this Court explained in *Horton*, without such a limitation, "[a] general law covering a subject disconnected with courts in its main features" would be excluded from the initiative process simply because "in an incidental and subsidiary way, the work of the courts may be increased or diminished or changed." 269 Mass. at 511. Given that every change in law is enforceable in the courts, applying the exclusion by its plain text would reduce the initiative process to a "near nullity." *Mazzone v. Attorney General*, 432 Mass. 515, 520 (2000).

No comparable concern justifies importing that test into the religious exclusion. Not every law affects religion, even incidentally, and the exclusion does not reach a petition that makes no reference to religion, religious practices, or religious institutions but might be said to have a downstream effect on those

subjects. *See Opinion of the Justices*, 309 Mass. 555, 556-559 (1941) (initiative petition "to allow physicians to provide medical contraceptive care to married persons for the protection of life or health" fell outside Article 48's religious exclusion where it "makes no discrimination by reason of the religious views of the persons within its scope" and "neither commands nor prohibits any form of religious belief or the teaching thereof, or any form of religious worship or religious practice").[10] As this Court recognized in *El Koussa v. Attorney General*, 489 Mass. 823 (2022), "[a]n express instruction or directive in an initiative petition is different from a consequential effect." *Id.* at 837.

In sum, the text of Article 48, the debates of the Constitutional Convention, this Court's decision in *Collin*s, and the Attorney General's own prior positions all point to the same conclusion: the Rent Control Petition relates to religion and religious institutions and must be excluded from the initiative process.

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[10] *Opinion of the Justices* "stands for the proposition that any measure merely permitting secular conduct which might otherwise be governed by individual religious beliefs is a proper measure for initiative or referendum." Stewart, *The Law of Initiative Referendum in Massachusetts*, 12 New England L. Rev. 455, 480 (1977). It does not—and could not—stand for the proposition that a measure that expressly references religion might fall outside the religious exclusion. The petition at issue in *Opinion of the Justices* contained no reference to religion. See 309 Mass. at 556.

II. The Rent Control Petition is Excluded From the Initiative Process Because It Affords No Possibility of Compensation for the Appropriation of Property Rights.

The Rent Control Petition is inconsistent with the "right to receive compensation for private property appropriated to public use," guaranteed by Article 10 of the Declaration of Rights. Amend. Art. 48, The Initiative, Part II, § 2. *Amici* adopt the arguments of the Appellants on this point and further emphasize one critical respect in which the Rent Control Petition is even more constitutionally deficient than the petition at issue in *Dimino v. Sec'y of the Commonwealth*, 427 Mass. 704 (1998). The petition in *Dimino* at least grappled with the compensation problem by requiring a study on whether compensation was required and expressing an expectation by the people that the Legislature would act to address any deficiencies. *See id.* at 710-711. The Rent Control Petition does not even do that. It eliminates a 30-year statutory guarantee of market-rate compensation without so much as acknowledging the deprivation suffered by property owners.

In fact, the petition contains no mechanism for relief of any kind. In *Yankee Atomic Electric Co. v. Sec'y of the Commonwealth*, 403 Mass. 203 (1988), this Court recognized that the possibility of compensation through an administrative process affects the analysis of whether a measure constitutes an unconstitutional taking. *Id.* at 210. Yet, unlike other rent control laws, the petition contains no administrative process for residential property owners to seek increases above the

cap based on capital improvements, rising operating costs, property tax surcharges, financial hardship, or an insufficient return on investment. For example, the District of Columbia's Rental Housing Act permits a housing provider to submit a hardship petition to the Rent Administrator for an adjustment in the allowable increase, D.C. Code § 42-3502.06(c), and the Rent Administrator "shall . . . allow additional increases in rent which would generate no more than a 12% rate of return," D.C. Code § 42-3502.12(a).[11]

Likewise, New York City's rent control law requires its city rent agency to promulgate regulations allowing individual adjustment of maximum rents in a variety of circumstances, including where the rental income from a property yields a net annual return of fewer than 6 percent of the valuation of the property, N.Y.C. Admin. Code § 26-405(g)(1)(a), where unavoidable increases in operating costs have not been offset by rental income, *id.* at (g)(1)(b), where the building has undergone substantial rehabilitation that meaningfully increases its value, *id.* at (g)(1)(f), where major capital improvements have been made to the structure, *id.* at (g)(1)(g), or where unique circumstances have resulted in a rent substantially below that of comparable units in the same area, *id.* at (g)(1)(j), among other grounds. And San Francisco's Residential Rent Stabilization and Arbitration

[11] The Act further permits petitions for increases based on capital improvements. D.C. Code § 42-3502.10.

Ordinance allows landlords to impose rent increases based on the cost of capital improvements, rehabilitation, energy conservation improvements, or renewable energy improvements once certified by the Rent Board. S.F. Admin. Code § 37.3(b)(3).

Nor does the Rent Control Petition allow residential property owners to reset rents to market rates following a vacancy. *Contrast* Cal. Civ. Code § 1947.12(b). Residential property owners also cannot bank unused annual increases and apply them in future years. *Contrast* S.F. Admin. Code § 37.3(b)(3). More fundamentally, the petition imposes a single statewide cap across every municipality in the Commonwealth with no mechanism for localities to account for differences in property costs, operating expenses, or local housing markets.

The practical consequence of the absence of any mechanism to obtain administrative relief post-enactment is significant. For the twelve months ending June 2025, the national CPI-U increased 2.7 percent.[12] Meanwhile, property taxes in Massachusetts increased in the aggregate by 5.1 percent from fiscal year 2024 to fiscal year 2025.[13] Water and sewer rates across Massachusetts Water Resources

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[12] U.S. Bureau of Labor Statistics, *Consumer Price Index — June 2025* (July 15, 2025), https://www.bls.gov/news.release/archives/cpi_07152025.htm.

[13] Tom Guilfoyle, *FY2025 Tax Levies, Assessed Values and Tax Rates*, Mass. Div. of Local Services (Jan. 16, 2025), https://www.mass.gov/info-details/fy2025-tax-levies-assessed-values-and-tax-rates.

Authority communities increased by an average of 4.28 percent from 2024 to 2025.[14] And home insurance premiums in Massachusetts rose by 12.7 percent from 2023 to 2024—the most recent year for which figures are available.[15] Accordingly, the petition ensures not only that property owners are deprived of their statutory right to market-rate compensation but also that the deprivation will worsen over time as ownership costs continue to outpace the cap.

III. The Attorney General's Summary of the Rent Control Petition Fails to Inform Voters That the Petition Repeals the Existing Rent Control Prohibition and Imposes a New Rent Control Scheme.

Article 48 requires the Attorney General to prepare a "fair, concise summary" of each initiative petition. Amend. Art. 48, The Initiative, Part II, § 3. The summary is the primary official source of information about an initiative petition for most voters. It appears in three places over the course of the initiative petition process: on the signature forms used for gathering signatures, in the Information for Voters Guide mailed to all residential addresses before the election, and on the ballot itself. *See Hensley v. Attorney General*, 474 Mass. 651, 660

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[14] MWRA Advisory Board, *2025 Annual Water and Sewer Retail Rate Survey 3* (2026), https://www.mwraadvisoryboard.com/2025-rate-survey-released-how-does-your-community-compare.

[15] Michael T. Caljouw, *Massachusetts Division of Insurance Annual Home Insurance Report for Calendar Year 2024*, Mass. Div. of Ins. (2025), https://www.mass.gov/doc/the-2024-massachusetts-market-for-home-insurance/download.

(2016). For most voters, it is the only official information about the proposed law longer than a single sentence that they will read. As the dissenting members of the Committee on the Initiative and Referendum observed, "the western experience is that practically no voters read and understand the text of complicated laws proposed" and to expect otherwise would be "a Utopian dream."[16] *2 Debates* at 12.

The other official information sources are statutory rather than constitutional, convey less information, and reach voters at fewer points in the process. General Laws c. 54, § 53 requires the Attorney General and the Secretary of the Commonwealth to jointly prepare a title for each initiative petition, which appears only in the Information for Voters Guide. Section 53 also requires the Attorney General to prepare one-sentence statements describing the effect of a "yes" or "no," which are printed on the ballot and in the Information for Voters Guide but do not appear on the signature forms used for gathering signatures.

"To be 'fair,' the Attorney General's summary must provide voters with 'a fair and intelligent conception of the main outlines of the measure,'" and it "ought

[16] Over a century later, this assessment holds equal force. *See* William T. Pound, *Initiative and Referendum in the 21st Century: Final Report and Recommendations of the NCSL I&R Task Force*, NATIONAL CONFERENCE OF STATE LEGISLATURES 24 (July 2002) ("Many voters never read more than the title and summary of the text of initiative proposals.")

to be written in plain English that a reasonable voter can readily comprehend." *Hensley*, 474 Mass. at 662, quoting *Sears v. Treasurer & Receiver Gen.*, 327 Mass. 310, 324 (1951). The Attorney General's summary of the Rent Control Petition does not meet that standard. Most significantly, it omits a main feature of the measure: the repeal of the Commonwealth's 30-year prohibition on rent control. The prominent nature of this feature is evidenced by the fact that it appears in the petition's very first sentence: "The General Laws are hereby amended by striking out chapter 40P and inserting in place thereof the following chapter."

Compounding this omission, the summary describes the petition's rent cap in language that could be read to suggest modification of an existing scheme rather than creation of a new one. The proposed law itself uses the word "establish," *see* Petition at § 3, but the Attorney General omits that word from her summary. Instead, the summary simply states that the proposed law "would limit the annual rent increase for residential units in Massachusetts to the annual increase in the Consumer Price Index for a 12-month period, or 5%, whichever is lower." A voter who reads this summary without knowledge of the existing prohibition on rent control could reasonably conclude that the petition merely adjusts an existing rent cap rather than imposing one for the first time.

Of course, voters do not read the summary in isolation, and this Court has recognized "the important educational and advocacy role proponents and

opponents of the petitions have 'to the voters in the public discourse leading up to election day.'" *El Koussa*, 494 Mass. at 280, quoting *Hensley*, 474 Mass. at 663, n. 19. But while advocates play an important role in public discourse, it is limited to the presentation of arguments for or against a petition.[17] Advocates have no constitutional duty to provide fair and accurate information to voters. The Attorney General does. Especially in an era of pervasive misinformation, it would be imprudent to rely on advertising and other forms of campaign messaging to inform voters about the main features of a measure. Likewise, where public trust in the media is at an all-time low, the Attorney General cannot rely on news reporting to fill the gaps left by a confusing or misleading official summary.[18]

Inclusion of the fact that the petition repeals an existing law—or at least imposes something new—would not make the summary "partisan, colored, argumentative, or in any way one-sided." *Hensley*, 474 Mass. at 662. A summary risks crossing that line when it ventures beyond the text of a petition to opine on its effects or consequences. Where, as here, the petition itself states that it repeals a

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[17] That role is reflected in the statutory requirement that the Secretary of the Commonwealth seek arguments for and against each petition from its principal proponents and opponents for inclusion in the Information for Voters Guide. G.L. c. 54, § § 53-54.

[18] *See* Megan Brenan, *Trust in Media at New Low of 28% in U.S.*, GALLUP (Oct. 2, 2025), https://news.gallup.com/poll/695762/trust-media-new-low.aspx.

law and replaces it with a new chapter, that fact falls within the four corners of the measure and is properly included in the summary.

IV. The Rent Control Petition's Draftsmanship Errors Render It Neither Susceptible to a Comprehensible Summary Nor in Proper Form.

The Attorney General's gatekeeping function requires her "'to certify that there are no mistakes'" in an initiative petition. [19] *Nigro v. Attorney General*, 402 Mass. 438, 446 (1988), quoting from *2 Debates* at 724. Specifically, she must certify that a petition is in "proper form," a requirement "primarily concerned with avoiding errors in draftsmanship" such as the failure to propose binding law. *Nigro*, 402 Mass. at 446; *Paisner v. Attorney General*, 380 Mass. 593, 600 (1983). The Attorney General has also historically read the "proper form" requirement together with Article 48's requirement that she prepare a "fair, concise summary" of the proposed law to require her to decline to certify a measure if it is not susceptible to preparation of a comprehensible summary. *See, e.g.*, *Attorney General Declination Letter for Petition 17-28,* Add. 128 ("[I]t is generally

[19] While this Court "ordinarily restricts its discussion to the arguments made by the parties and does not address arguments of amici curiae," it has made exceptions in special circumstances. *Bongaards v. Millen*, 440 Mass. 10, 19 n.6 (2003). Such circumstances are present here because the Appellants raised the proper form requirement in their complaint, and the arguments implicate the integrity of the initiative process.

understood that a law is not in 'proper form' when it is not susceptible to preparation of a comprehensible summary.").

The operative feature of the Rent Control Petition is the imposition of a statutory cap on annual rent increases. The petition provides that it will "establish a limit on any annual rent increase for a covered dwelling unit in the commonwealth, which shall not exceed the annual increase in Consumer Price Index or 5%, whichever is lower, in any 12-month period." Petition at § 3. At first blush this language sounds precise, but in fact it conveys almost nothing about how the cap will be calculated.

The threshold problem is that "the" Consumer Price Index does not exist. The Bureau of Labor Statistics does not publish one Consumer Price Index but three distinct indexes—the Consumer Price Index for All Urban Consumers ("CPI-U") the Consumer Price Index for Urban Wage Earners and Clerical Workers ("CPI-W"), and the Chained Consumer Price Index for All Urban Consumers ("C-CPI-U")—broken into approximately 4,686 individual data series, each potentially yielding a different result.[20]

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[20] U.S. Bureau of Labor Statistics, *Frequently Asked Questions about the Chained Consumer Price Index for All Urban Consumers (C-CPI-U)*, https://www.bls.gov/cpi/additional-resources/chained-cpi-questions-and-answers.htm; Fed. Reserve Bank of St. Louis, *CPI, BLS — Economic Data Series*, https://fred.stlouisfed.org/tags/series?t=bls%3Bcpi%3Bindexes&ob=pv&od=desc (4,686 data series).

These indexes are not interchangeable. The CPI-U covers approximately 90 percent of the U.S. population and is based on the expenditures of almost all residents of urban or metropolitan areas.[21] The CPI-W covers a narrower subset of the population, limited to households in which more than half of their income derives from clerical or wage occupations and at least one earner has been employed for at least 37 weeks during the previous 12 months.[22] The C-CPI-U uses a methodology that accounts for consumers' tendency to substitute cheaper goods when prices rise, and as a result tends to yield a lower inflation reading than the CPI-U.[23] The choice between them is a substantive policy judgment, not a drafting detail.

In addition, "[f]or the CPI-U and CPI-W, separate indexes are also published by size of city, by region of the country, for cross-classifications of regions and population-size classes, and for 23 selected local areas."[24] The U.S. Bureau of

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[21] U.S. Bureau of Labor Statistics, *Consumer Price Index Summary*, https://www.bls.gov/news.release/cpi.nr0.htm.

[22] *Id.*

[23] Congressional Budget Office, *Differences Between the Traditional CPI and the Chained CPI* (Apr. 19, 2013), https://www.cbo.gov/publication/44088; U.S. Bureau of Labor Statistics, *Frequently Asked Questions about the Chained Consumer Price Index (C-CPI-U)*, https://www.bls.gov/cpi/additional-resources/chained-cpi-questions-and-answers.htm.

[24] U.S. Bureau of Labor Statistics, *Consumer Price Index — March 2026*, https://www.bls.gov/news.release/pdf/cpi.pdf.

Labor Statistics also publishes both unadjusted and seasonally adjusted figures.[25] Taken together, these variables mean that the petition could produce substantially different rent caps depending on the index selected, the geographic area applied, and whether the data is adjusted or unadjusted.

The petition's reference to "a 12-month period" introduces a further ambiguity. Petition at § 3. Because BLS publishes CPI data monthly, the cap could vary significantly depending on which 12-month window is used and what methodology governs the calculation of change over that period. The petition answers neither question.

Critically, the petition confers no authority on any administrative body to determine the applicable index, the relevant geographic area, the measurement methodology, whether seasonal adjustment applies, or which month closes the 12-month window. Nor can judicial construction fill these gaps. Each of these choices is a legislative judgment expressly reserved for the people by Article 48, and a court asked to make them would be writing the law, not interpreting it, in violation of Article 30 of the Declaration of Rights.

Because the petition itself does not define how the rent cap will be calculated, the Attorney General's summary—which simply parrots the petition's

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[25] U.S. Bureau of Labor Statistics, *Consumer Price Index Summary*, https://www.bls.gov/news.release/cpi.nr0.htm.

vague language—is not comprehensible. A voter reading the summary would have no basis for understanding how the cap will be determined. A summary that fails to give voters a fair and intelligent conception of the measure's operative feature is not a fair summary within the meaning of Article 48. *See Hensley*, 474 Mass. at 662. *Cf. Attorney General's Declination Letter for Petition 17-15* ("[T]he terms 'small buildable' and 'affordable fair market value' . . . lack specificity that would allow the Attorney General to fairly and concisely inform the voter as to the meaning of the proposed law").

In short, the petition's failure to define its central calculation renders any summary of it inherently unfair and the petition itself not in proper form—two independent grounds on which Article 48 precludes it from the ballot. Amend. Art. 48, The Initiative, Part II, § 3.

CONCLUSION

For the above reasons, the Court should declare that the Attorney General's certification and summary do not comply with Article 48 and order that the petition not be placed on the November 2026 ballot.

Respectfully submitted,

GREATER BOSTON CHAMBER OF COMMERCE,

CHARLES RIVER REGIONAL CHAMBER, and

RETAILERS ASSOCIATION OF MASSACHUSETTS,

By their attorney,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 17 (brief of an amicus curiae); and
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 and contains 6,957 total non-excluded words as counted using the word count feature of Microsoft Word Version 2603.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2026, I filed the Brief of *Amici Curiae* with the Supreme Judicial Court and served the following attorneys of record for each party by the Court's Electronic Filing System:

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ADDENDUM

Rei (rā), *n.*; *pl.* REIS (rāʹĭs *or* rēz). [Pg. *real*, pl. *reis*.] A Portuguese money of account, in value about one mill.

‖ **Reichs'rath'** (rīksʹrätʹ), *n.* [G.] The parliament of Austria (exclusive of Hungary, which has its Diet).

‖ **Reichs'stadt'** (rīksʹstätʹ), *n.* [G.] A free city of the former German empire.

‖ **Reichs'tag'** (rīksʹtägʹ), *n.* [G.] The Diet, or House of Representatives, of the German empire, which is composed of members elected by the people.

Rei'gle (rēʹgʹl), *n.* [F. *règle* rule, fr. L. *regula*. See RULE.] A hollow cut or channel for guiding anything.

Reign (rān), *n.* [OF. *reigne*, *regne*, fr. L. *regnum*, fr. *rex*, *regis*, a king, fr. *regere* to guide, rule.] **1.** Royal authority; supreme power; sovereignty; rule; dominion. **2.** The time during which a king, queen, or emperor possesses supreme authority.

Reign (rān), *v. i.* [*imp.* & *p. p.* REIGNED (rānd); *p. pr.* & *vb. n.* REIGNING.] **1.** To possess or exercise sovereign power or authority; to hold supreme power; to rule. **2.** Hence, to be predominant; to prevail. **3.** To have superior or uncontrolled dominion; to rule.

Syn. — To rule; govern; direct; control; prevail.

Re'im-burse' (rēʹĭm-bûrsʹ), *v. t.* [*imp.* & *p. p.* REIMBURSED (-bûrstʹ); *p. pr.* & *vb. n.* REIMBURSING.] **1.** To replace in a treasury or purse, as an equivalent for what has been taken; to refund; to pay back; to restore. **2.** To pay back to; to indemnify.

Re'im-burse'ment (-bûrsʹment), *n.* A reimbursing.

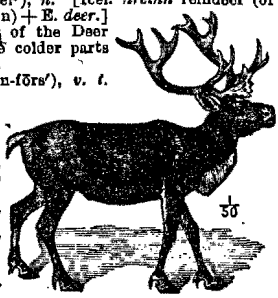
Re'im-burs'er (-bûrsʹẽr), *n.* One who reimburses.

Re'im-port' (-pōrtʹ), *v. t.* To import again; to import what has been exported.

Rein (rān), *n.* [F. *rêne*, deriv. of L. *retinere* to hold back. See RETAIN.] **1.** The strap of a bridle, by which the rider or driver governs the horse. **2.** Hence, an instrument or means of curbing, restraining, or governing.

Rein, *v. t.* [*imp.* & *p. p.* REINED (rānd); *p. pr.* & *vb. n.* REINING.] **1.** To govern or direct with the reins. **2.** To restrain; to control; to check.

Rein'deer' (rānʹdērʹ), *n.* [Icel. *hreinn* reindeer (of Lapp or Finnish origin) + E. *deer*.] (*Zoöl.*) A ruminant of the Deer family, found in the colder parts of both hemispheres.



European Reindeer (*Rangifer tarandus*).

Re'in-force' (rēʹĭn-fōrsʹ), *v. t.* See REINFORCE, *v. t.*

Reins (rānz), *n. pl.* [F. *rein*, pl. *reins*, fr. L. *ren*, pl. *renes*.] **1.** The kidneys; also, the region of the kidneys; loins. **2.** Inward impulses; affections and passions.

Re'in-spect' (rēʹĭn-spĕktʹ), *v. t.* To inspect again.

Re'in-stall' (-stôlʹ), *v. t.* To install again.

Re'in-state' (-stātʹ), *v. t.* To instate again.

Re'in-sur'ance (-shụrʹans), *n.* **1.** Insurance a second time or again. **2.** A contract by which an insurer is insured against risk incurred in insuring somebody else.

Re'in-sure' (-shụrʹ), *v. t.* To effect a reinsurance of.

Re-in'te-grate (rē-ĭnʹtē-grāt), *v. t.* To renew with regard to any state or quality; to restore; to reëstablish.

Re'in-vest' (rēʹĭn-vĕstʹ), *v. t.* To invest again.

Re'in-vest'ment (-vĕstʹment), *n.* Act of reinvesting.

Re'in-vig'or-ate (-vĭgʹẽr-āt), *v. t.* To invigorate anew.

‖ **Re'is** (rāʹĭs *or* rēz), *n.* See REL.

Reis (rīs), *n.* [Ar. *raïs* head, chief, prince.] A common title in the East for a person in authority.

Re-is'sue (rē-ĭshʹūʹ), *v. t.* & *i.* To issue a second time.

Re-is'sue, *n.* A second or repeated issue.

Re-it'er-ate (rē-ĭtʹẽr-āt), *v. t.* To repeat again and again; sometimes, to repeat.

Syn. — To repeat; recapitulate; rehearse.

Re-it'er-a'tion (-āʹshŭn), *n.* Act of reiterating; that which is reiterated.

Re-ject' (rē-jĕktʹ), *v. t.* [*imp.* & *p. p.* REJECTED; *p. pr.* & *vb. n.* REJECTING.] [L. *rejectus*, p. p. of *reicere*, *rejicere*; pref. *re-* re- + *jacere* to throw.] **1.** To cast from one; to discard. **2.** To refuse to receive or to acknowledge; to repudiate. **3.** To refuse to grant. — **Re-ject'er** (-ẽr), *n.*

Syn. — To repel; renounce; rebuff; refuse; decline.

Re-ject'a-ble (-ȧ-bʹl), *a.* That may or ought to be rejected.

Re-jec'tion (rē-jĕkʹshŭn), *n.* A rejecting; state of being rejected.

Re-joice' (rē-joisʹ), *v. i.* & *t.* [*imp.* & *p. p.* REJOICED (-joistʹ); *p. pr.* & *vb. n.* REJOICING (-joiʹsĭng).] [OF. *resjouir*, *resjoir*, pref. *re-* re- + *esjouir*, *esjoir*, to rejoice; pref. *es-* (L. *ex-*) + *jouir*, *joir*. See JOY.] To feel, or cause to feel, joy; to experience gladness in a high degree.

Syn. — To delight; joy; exult; triumph; please; cheer; exhilarate; delight.

Re-joi'cer (rē-joiʹsẽr), *n.* One who rejoices.

Re-joi'cing (-sĭng), *n.* **1.** Joy; gladness; delight. **2.** The expression of joy or gladness. **3.** That which causes to rejoice.

Re-joi'cing-ly, *adv.* With joy or exultation.

Re-join' (rē-joinʹ), *v. t.* **1.** To join again; to unite after separation. **2.** To join the company of again. **3.** To state in reply.

Re-join', *v. i.* **1.** To answer to a reply. **2.** (*Law*) To answer, as the defendant to the plaintiff's replication.

Re-join'der (-dẽr), *n.* **1.** An answer, esp. to a reply. **2.** (*Law*) The defendant's answer to the plaintiff's replication.

Syn. — Reply; answer; replication. See REPLY.

Re-joint' (rē-jointʹ), *v. t.* **1.** To reunite the joints of. **2.** Specif. (*Arch.*), to repair the joints of with fresh mortar.

Re-judge' (rē-jŭjʹ), *v. t.* To judge again; to reëxamine.

Re-ju've-nate (rē-jūʹvē-nāt), *v. t.* [Pref. *re-* + L. *juvenis* young, youthful.] To render young again.

Re-ju've-nes'cence (-nĕsʹens), *n.* A renewing of youth; state of being or growing young again.

Re-ju've-nes'cent (-ent), *a.* Becoming, or causing to become, rejuvenated; rejuvenating.

Re-kin'dle (rē-kĭnʹdʹl), *v. t.* & *i.* To kindle again.

Re-laid' (rē-lādʹ), *imp.* & *p. p.* of RELAY.

Re-lapse' (rē-lăpsʹ), *v. i.* [*imp.* & *p. p.* RELAPSED (-lăpstʹ); *p. pr.* & *vb. n.* RELAPSING.] [L. *relabi*, p. p. *-lapsus*; *re-* re- + *labi* to fall, slip, slide. See LAPSE.] **1.** To slip back. [*Obs.*] **2.** Fig.: To slide or turn back into a former state or practice; — generally in a bad sense. **3.** (*Theol.*) To fall from Christian faith; to backslide.

Re-lapse', *n.* A sliding or falling back, esp. into a former bad state, either of body or morals; state of having fallen back.

Re-laps'er (-lăpsʹẽr), *n.* One who relapses.

Re-late' (rē-lātʹ), *v. t.* [*imp.* & *p. p.* RELATED; *p. pr.* & *vb. n.* RELATING.] [F. *relater* to recount, LL. *relatare*, fr. L. *relatus*, as p. p. of *referre*. See RE-; TOLERATE.] **1.** To restore. [*Obs.*] **2.** To recount; to narrate; to tell over. **3.** To ally by connection or kindred.

Syn. — To recite; rehearse; report; detail; describe.

Re-late', *v. i.* To have relation; to pertain; to refer.

Re-lat'ed (-lātʹĕd), *p. p.* & *a.* **1.** Allied; kindred; connected by blood or affinity. **2.** Standing in relation or connection.

Re-lat'er (-ẽr), *n.* One who relates or narrates.

Re-la'tion (rē-lāʹshŭn), *n.* **1.** Act of relating or telling; also, that which is related. **2.** State of being related or of referring; the being such and such with regard or respect to some other thing; connection. **3.** Reference; respect; regard. **4.** Connection by consanguinity or affinity; kinship. **5.** A person connected by consanguinity or affinity. **6.** (*Law*) (*a*) The carrying back of, and giving effect or operation to, an act or proceeding, as if it had happened or begun at a prior time. (*b*) The act of a relator at whose instance a suit is begun.

Syn. — Recital; rehearsal; narration; account; narrative; tale; detail; description; kindred; consanguinity; affinity; kinsman; kinswoman.

Re-la'tion-al (-al), *a.* **1.** Having relation or kindred; related. **2.** Indicating or specifying some relation.

Re-la'tion-ship, *n.* State of being related.

Rel'a-tive (rĕlʹȧ-tĭv), *a.* **1.** Having relation or reference; referring; pertaining. **2.** Resulting from connection with, or reference to, something else; not absolute. **3.** (*Gram.*) Indicating or expressing relation; referring to an antecedent. — **Rel'a-tive-ly**, *adv.* — **Rel'a-tive-ness**, *n.*

Rel'a-tive, *n.* One who, or that which, relates to, or is considered in its relation to, something else. Specif.: (*a*) A person connected by blood or affinity; strictly, one allied by blood. (*b*) (*Gram.*) A relative pronoun.

Rel'a-tiv'i-ty (-tĭv'ĭ-tȳ), *n.* State of being relative.

Re-lat'or (rē-lātʹẽr), *n.* [L.] **1.** One who relates; a relater. **2.** (*Law*) A private person at whose instance, or in whose behalf, the attorney-general allows an information in the nature of a *quo warranto* to be filed.

Re-lax' (rē-lăksʹ), *v. t.* [*imp.* & *p. p.* RELAXED (-lăkstʹ); *p. pr.* & *vb. n.* RELAXING.] [L. *relaxare*; prof. *re-* re- + *laxare* to loose, to slacken, from *laxus*

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SUFFOLK, SS. 1990 SITTING

No.

JOHN F. COLLINS, ET AL.,

Plaintiffs,

v.

MICHAEL J. CONNOLLY, SECRETARY
OF THE COMMONWEALTH,

Defendant.

ON RESERVATION AND REPORT FROM THE SUPREME
JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF FOR THE DEFENDANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

COMMONWEALTH OF MASSACHUSETTS

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ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF FOR THE DEFENDANT

ISSUE PRESENTED

IS CHAPTER 516 OF THE ACTS OF 1989, WHICH EXEMPTS RELIGIOUS INSTITUTIONS FROM MASSACHUSETTS' ANTI-DISCRIMINATION LAWS, A LAW THAT "RELATES TO RELIGION, RELIGIOUS PRACTICES, OR RELIGIOUS INSTITUTIONS" AND THEREFORE EXCLUDED FROM THE REFERENDUM PROCESS BY ARTICLE 48?

STATEMENT OF THE CASE

This is before the Court on a reservation and report of the Single Justice. It is a challenge to the Secretary of State's determination, in keeping with advice rendered by the Attorney General, that chapter 516 of the

Acts of 1989 may not be made subject to the referendum process under Article 48. Chapter 516 exempts religious institutions from Massachusetts' anti-discrimination laws and adds to some of those laws a prohibition against discrimination on the basis of sexual orientation.

The Secretary is otherwise satisfied with the statement of the case presented by the plaintiffs under the headings "Statement of Facts" and "Prior Proceedings."

CHAPTER 516: THE LAW AT ISSUE

Chapter 516 amends Massachusetts' anti-discrimination laws in two ways: it adds a prohibition of discrimination on the basis of sexual orientation, and it expands the exemption provided religious institutions from all of Massachusetts' anti-discrimination laws. Prior to the passage of chapter 516, G.L. c. 151B contained limited exemptions which permitted religious institutions to discriminate in whom they admitted to their religious institutions, G.L. c. 151B, §4, and to discriminate in hiring or employment in favor of members of their own religion. G.L. c. 151B, §1(5). Chapter 516

expands these exemptions. This expansion does not merely exempt religious institutions from the new prohibition on discrimination on the basis of sexual orientation. Instead, this expanded exemption applies with equal force to discrimination on the basis of race, sex, national origin, color, creed, and age.

Because it is this expansion of the exemption for religious institutions that precludes a referendum on chapter 516, it is described in detail below.

The religious exemption is expanded in chapter 516 through the repeal of prior law, and the insertion of both new language and language identical to that repealed. Sections 1 and 14 of chapter 516 are as follows, with the language that did not previously appear in G.L. c. 151B highlighted:

> SECTION 1. Subsection 5 of section 1 of chapter 151B of the General Laws, as appearing in the 1988 edition, is hereby amended by striking out the last sentence and inserting in place thereof the following sentence:- Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or religious purposes, which is operated, supervised, or controlled by or in connection with a religious organization, and which limits membership, enrollment,

admission, or participation to members of that religion, from giving preference in hiring or employment to members of the same religion or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

. . . .

SECTION 14. Said section 4 of said chapter 151B, as so appearing, is hereby further amended by striking out the third paragraph and inserting in place thereof the following paragraph:-

Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

(The words beginning with "taking any action . . ." in section 14 replace the words "making such a selection as is" which is the only language that the new law repeals and does not reinsert.)

As the text demonstrates, these sections of chapter 516 expand the religious exemption in several ways. Where G.L. c. 151B previously allowed for religious institutions to give "preference in hiring or employment to members

of the same religion," G.L. c. 151, §1(5), section 1 of chapter 516 allows religious institutions to take "any action with regard to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom or law which are calculated to promote the religious principles for which it is established or maintained." (emphasis supplied).

Such action need no longer reflect "preference . . . to members of the same religion." Where c. 151B previously allowed religious institutions to discriminate only in favor of co-religionists, section 1 of chapter 516 now allows religious institutions to discriminate on the basis of any of the characteristics listed in c. 151B, including on the basis of race, sex, national origin, color, creed, or age, or sexual orientation so long as the action may promote the organization's religious principles.

This expanded exemption applies not simply to churches but to "any organization operated for educational or charitable purposes, which is operated, supervised, or controlled by or in connection with a religious organization, and

which limits membership, enrollment, admission, or participation to members of that religion."

In terms similar to the amendment by section 1 of c. 151B, §1(5), section 14 of chapter 516 broadly expands the religious exemption found in G.L. c. 151B, §4. Prior to chapter 516, G.L. c. 151B, §4 tolerated religious institutions' "limiting admission to or giving preference to persons of the same religion or denomination." G.L. c. 151B, §4. Section 14 of chapter 516 expands this exemption to tolerate "any action with regard to employment, discipline, faith, internal organization, or ecclesiastical rule, custom or law . . . ." (emphasis supplied).

Such action is no longer confined to "preference . . . to members of the same religion." Where chapter 151B previously allowed religious institutions to discriminate in admission or in favor of co-religionists, section 14 of chapter 516 now allows religious institutions to discriminate on the basis of any of the characteristics listed in c. 151B, including on the basis of race, sex, national origin, color, creed, or age, or sexual orientation so long as the action may promote

the organization's religious principles.

This expanded exemption applies not only to churches but to "any organization operated for educational or charitable purposes, which is operated, supervised, or controlled by or in connection with a religious organization."

Both expanded exemptions also apply "notwithstanding the provisions of any general or special law . . . ."

SUMMARY OF ARGUMENT

Article 48 excludes from the referendum any law that relates to religion, religious practices or religious institutions. This exclusion applies to any law, or portion of a law, that refers to or is connected with religion, religious practices or religious institutions. Chapter 516 of the Acts of 1989 plainly relates to religion, religious practices, and religious institutions under Article 48 by referring directly to religious institutions and religious principles, and by exempting religious institutions from Massachusetts' anti-discrimination laws when those institutions act pursuant to religious

principles. This exemption applies to discrimination on the basis of such characteristics as race, sex, national origin, color, creed, or age, as well as sexual orientation. (pp. 9-20).

The Court should not look beyond the plain meaning of chapter 516. Plaintiffs invite the Court to look beyond the plain meaning of chapter 516 and determine that the law's religious exemption is wholly coextensive with the First Amendment. The Court should not accept this invitation to characterize the breadth of chapter 516 without an actual controversy to frame, limit, and clarify the issues before it. (pp. 21-25).

This Court should not look beyond the plain meaning of chapter 516 and analyze whether the sections of the law that relate to religion, religious practices or religious institutions are merely incidental to the law as a whole. The history and framework of Article 48 indicate that no law that contains any section that relates to religion, religious practices or religious institutions should be made subject to the referendum process. (pp. 25-39).

If the Court does compare chapter 516 with First Amendment jurisprudence, it will find that the religious exemption provides more protection for religious institutions and affects more employees than does the First Amendment. Unlike the First Amendment, the exemption does not allow for the balancing of the state's interest against the rights of religious institutions. (pp. 39-48).

If the Court were apply an incidentality analysis to chapter 516, it would find that the sections of chapter 516 that relate to religion, religious practices or religious institutions are far too significant to be considered incidental, and that these sections serve an important purpose within chapter 516 as a whole. (pp. 49-53).

ARGUMENT

CHAPTER 516, WHICH CREATES AN EXPANSIVE EXEMPTION FOR RELIGIOUS INSTITUTIONS FROM THE REQUIREMENTS OF MASSACHUSETTS' ANTI-DISCRIMINATION LAWS, "RELATES TO RELIGION, RELIGIOUS PRACTICES OR RELIGIOUS INSTITUTIONS" AND IS THEREFORE EXCLUDED BY ARTICLE 48 FROM THE REFERENDUM PROCESS.

A. Chapter 516 plainly relates to religion, religious practices or religious institutions within the meaning of Article 48.

1. Article 48 excludes from the referendum process any law which is connected with or which refers to religion, religious practices or religious institutions.

Through Article 48 of the Amendments to the Massachusetts Constitution "the people reserve to themselves" the right to pass laws and constitutional amendments by initiative petition and the right to pass upon enacted legislation by referendum. Neither right is unlimited. "The people for their own protection have provided that the initiative shall not be employed with respect to certain matters." Bowe v. Secretary of the Commonwealth, 320 Mass 230, 247 (1946). Similarly, the referendum may not relate to certain subjects deemed "naturally unsuitable for popular lawmaking." Id. at 247. This Court has not hesitated to enforce these limits upon the initiative and referendum, lest "the people . . . be harassed by measures of a kind that they had solemnly declared they would not consider." Id.

One of the exclusions carved out from the general right of popular referendum is that "[n]o law that relates to religion, religious practices or religious institutions . . . shall be the subject of a referendum petition."

Amendments, Art. 48, The Referendum, Pt. III, §2.[1/]

The words of this exclusion must "be given their natural and obvious sense according to common and approved usage." Opinion of the Justices, 309 Mass. 555, 557 (1941) (interpreting religious exclusion of Article 48), citing General Outdoor Advertising Co. Inc. v. Department of Public Works, 289 Mass. 149, 158 (1935) and other cases; see also Yont v. Secretary of the Commonwealth, 275 Mass. 365, 367 (1931) (interpreting Article 48 exclusions from the referendum process); Buckley v. Secretary of the Commonwealth, 371 Mass. 195, 199 (1976) (interpreting Article 48). The word "relate" means "[t]o have connection, relation, or reference." The American Heritage Dictionary (Second College Ed., 1985); see also Webster's

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1/ The text of Amendments, Art. 48, The Referendum, Pt. III, §2 is as follows:
No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of the courts; or the operation of which is restricted to a particular town, city, or other political division . . . ; or that appropriates money for the current or ordinary expenses of the commonwealth . . . shall be the subject of a referendum petition.

New World Dictionary (Second College Ed., 1978) ("relate" means "to have some connection or relation [to]"). "A law 'relates to' an [area], in the normal sense of the phrase, if it has connection with or reference to such a[n area]." Commonwealth v. Morash, 402 Mass. 287, 293-94 (1988), reversed on other grounds sub nom. Massachusetts v. Morash, 109 S. Ct. 1668 (1989), quoting Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211, 2215 (1987), quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983).[2/]

As used in Article 48, the word "relates" has consistently been interpreted in precisely this "normal sense." In Commonwealth v. Yee, 361 Mass. 533 (1972), this Court was asked to decide whether a law which criminalized certain conduct "relate[d]" to the powers of courts under Article 48. In holding that this law

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2/ Because plaintiffs strenuously criticize the citation of Morash in this regard, Plaintiffs' Brief (PB) at 15-16, it bears noting that the case is cited for the proposition that the "normal sense" of the word "relates" means "connection with or reference to" -- not for the proposition that this "normal sense" is the appropriate standard for defining the word as it appears in Article 48. See 1989/90-2 Op. Att'y Gen. at 6, Statement of Agreed Facts Exhibit D. That latter proposition is established by such cases as Opinion of the Justices, 309 Mass. 555, 557 (1941) and Yont v. Secretary of the Commonwealth, 275 Mass. 365, 367 (1931).

did not so "relate," the Court stated that a statute does relate to the powers of courts if it "expressly confers or restricts a court's jurisdiction." Yee, 361 Mass. at 538. The Yee Court also pointed out that laws that "referred directly to the powers of the courts" relate to the powers of courts. Id., citing Commonwealth v. S. Co, 255 Mass. 369 (1926); deLeo v. Childs, 304 F.Supp. 593 (D.Mass. 1969).[3/]

With specific regard to the religious exclusion, the Court has noted that the "common usage" of the word "relates" means that a law relates to religion if it differentiates "by reason of the religious view of the persons within its scope" or if religion is "a factor in its application." Opinion of the Justices, 309 Mass. 555, 558-59 (1941). The Justices further noted that a law relates to religion within the

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3/ The "powers of courts" exclusion has been interpreted not to exclude laws containing provisions that relate only incidentally or indirectly to the powers of the courts. Yee at 539. The religious exclusion has not and should not be interpreted in this way. Supra at 32-39. However, because chapter 516 "relates to religion, religious practices or religious institutions" even under the Yee Court's reading of the judicial powers exclusion, supra at 49-54, this case does not require that the Court define the precise contours of the religious exclusion.

meaning of Article 48 if the law "distinctively" reaches beyond the purely secular to touch upon religion, religious practices or religious institutions. Id. at 558.

2. By expressly and broadly exempting religious institutions from the requirements of Massachusetts' anti-discrimination laws, chapter 516 plainly relates to religion, religious practices or religious institutions.

Chapter 516 is obviously excluded from the referendum process by the religious exclusion of Article 48. Chapter 516 refers "directly" and "distinctively" to religious institutions, differentiates between religious institutions and all other institutions, and differentiates between religious purposes and all other purposes. By any normal sense or common usage of the word "relates," chapter 516 relates to religion, religious practices or religious institutions.

Chapter 516 expands the exemption provided religious institutions from all of Massachusetts' anti-discrimination laws. In expanding the exemption, the language of chapter 516 itself demonstrates that the law relates to "any religious or denominational institution," and to "matters of . . . faith . . . or ecclesiastical rule, custom, or law" and to

"religious principles." St. 1989, c. 516, §§1, 14. The issue before the Court should be fully resolved by merely noting that chapter 516 "refer[s] directly" to religious institutions and principles. Yee, 361 Mass. at 538. Cf. Opinion of the Justices, 294 Mass. 607, 609 (1936) ("the proposed measure shows on its face that it is excluded from the operation of the initiative.").

The plain meaning of chapter 516 as well as its plain language compels the conclusion that the law relates to religion, religious practices or religious institutions. As described supra at 2-7, sections 1 and 14 of chapter 516 clearly and significantly expand the religious exemption from Massachusetts' anti-discrimination laws. Although some sections of chapter 516 deal exclusively with discrimination on the basis of sexual orientation, the exemption established by sections 1 and 14 applies to discrimination on the basis of race, sex, national origin, color, creed, or age as well as sexual orientation. Sections 1 and 14 of chapter 516 exempt religious institutions from these prohibitions under particular circumstances. See

supra at 5-6.[4/]

The plain meaning of the exemption found in sections 1 and 14 of chapter 516 is that certain types of discrimination are legal when undertaken by a religious organization but illegal when undertaken by an organization of a purely civic, political, fraternal, educational or charitable nature. Religious affiliation is "a factor in [chapter 516]'s application," and so chapter 516 relates to religion and is excluded from the referendum. See Opinion of the Justices, 309 Mass. at 559.

4/ Chapter 516 "relates" no less to religious institutions by allowing, rather than requiring, them to engage in particular conduct. For example, Attorney General Francis E. Kelly found a law excluded from the referendum process because it generally provided school committees with the authority to disapprove of private schools but then exempted from the disapproval process any judgment "on account of religious teaching." 1949/50 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 72-73 (1950). The law involved here even more prominently relates to religious institutions, as chapter 516 exempts religious institutions not only from the prohibition it creates (against discrimination on the basis of sexual orientation) but from a raft of pre-existing prohibitions against other types of discrimination.

Chapter 516 tolerates racial and other types of discrimination by religious institutions if, but only if, such acts are "calculated by such organization to promote the religious principles for which it is established and maintained." Chapter 516 thus favors religious justifications for discrimination over secular justifications for discrimination. Because the provisions of chapter 516 differentiate "by reason of the religious views of the persons within its scope" and religious principles are "a factor in [chapter 516]'s application," chapter 516 is excluded from the referendum. Id. at 558-59.

Chapter 516 also dramatically extends the application of these expanded exemptions beyond the limits of G.L. c. 151B. Both section 1 and section 14 of chapter 516 have force "nothwithstanding the provisions of any general or special law . . . ." In providing religious institutions with a defense to actions filed under other statutes, chapter 516 allows religious institutions and their affiliates to take actions that secular institutions may not

take.[5/]

The exclusion of chapter 516 from the referendum process is precisely the type of result intended by the framers of Article 48. The exclusion of laws relating to religious institutions from the referendum and initiative process reflects the profound concern of those present at the Constitutional Convention of 1917-1918 "th t to promote civic harmony the irritating question of religion should be removed as far from politics as possible." Bloom v. School Committee of Springfield, 376 Mass. 35, 39 (1978). Mr. Swig of Taunton, the author of the exclusion, noted that:

> We have some men in politics who make religion a profession. They try to get

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5/ It is unclear which and how many statutes are affected by this provision. One statute which may be affected is G.L. c. 272, §98, which prohibits discrimination in the provision of public accommodations. The broadly worded exemptions found in chapter 516 seem to carve out a new exemption in the public accommodations law for religious institutions and organizations operated, supervised or controlled by or in connection with them and which limit membership, enrollment, admission or participation to members of that religion.

Any uncertainty surrounding the applicability of the chapter 516 exemptions should be resolved in light of actual future controversies, an approach that the Court would foreclose if it adopted plaintiffs' assertion that chapter 516 fails to alter any substantive rights. See PB at 20-35.

> political preferment because of their religious belief . . . . I am endeavoring, by means of my amendment, to protect the initiative and referendum from the efforts that will be made . . . to drag constantly before the people these religious fights. 2 Debates in the Constitutional Convention, 1917-1918 767 (1918) (Debates).

Mr. Curtis of Boston concurred:

> It seems to me that all religious subjects would be handled better by considering them before the Legislature than in . . . making them the subject of a general discussion by the people at large. 2 Debates at 768.

The framers clearly had in mind religious measures of the type found in chapter 516. Chapter 516 includes a broad "preferment" of religious institutions that permits such institutions to discriminate on the basis of race, color, national origin, sex, age, ancestry, handicap, and sexual orientation in ways not permitted to any other persons or organizations. This preferment has been considered and enacted by the Legislature. If it were made the subject of a referendum, the public would be permitted to decide directly the status of religious institutions under Massachusetts' anti-discrimination laws. Under the plain terms of Article 48, this is simply not permitted.

B. Article 48 requires only that a law relate to religion, religious practices or religious institutions to be excluded from the referendum.

Plaintiffs do not directly dispute the relationship of sections 1 and 14 to religious institutions and principles detailed above. Indeed, their arguments concede that sections 1 and 14 of chapter 516 relate to religion in at least some ways.[6/] Instead, they argue that the ways these sections relate to religion are insignificant under Article 48 in light of two assertions: that sections 1 and 14 "merely recognize" existing First Amendment caselaw and that sections 1 and 14 are "merely incidental" to the main design of chapter 516. As is argued below, plaintiffs are incorrect in both of these assertions. See infra at 39-49 (chapter 516 does not merely recognize First Amendment caselaw) and infra at 49-53 (sections 1 and 14 are not merely incidental to the main design of chapter 516). However, the Court need not reach these arguments because they are not relevant to

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6/ See PB at Heading I.B. (Chapter 516 is "connected with" excluded subject matter, though only incidentally.). See also PB at 22 (Chapter 516 conditions exemption on whether actions "relate to church . . ." and so restates the First Amendment.).

the Court's analysis of the religious exclusion in Article 48. The Court should not require that a law do anything more than relate to religion, religious practices or religious institutions to be excluded from the referendum process under Article 48.

1. The Court should decline to determine whether every conceivable application of the religious exemption of chapter 516 will exactly and permanently duplicate the requirements of the First Amendment.

Implicitly recognizing, as they must, that chapter 516 quite explicitly relates to religion, the plaintiffs argue that the Court should analyze the terms of chapter 516 and attempt to determine whether the chapter 516 religious exemption will be applied, in all cases and for all time, in a manner that merely duplicates the mandates of the free exercise clause of the First Amendment to the United States Constitution. Such a determination would not have any relevance to Article 48, which excludes laws that relate to religion without regard for their constitutional underpinnings, if any. Nonetheless, plaintiffs ask that such an analysis be done, suggest that it will demonstrate that the exemption is coextensive

with the First Amendment, and propose that the Court find that chapter 516 does not relate to religion because of this coextensivity. PB at 20-35. The Court should reject the invitation to engage in an exercise so far removed from the terms of Article 48.[7/]

Accepting plaintiffs' invitation would plunge the Court into analysis of a statute without a live controversy to frame, limit, and clarify the issues before it. In arguing that sections 1 and 14 merely echo the Constitution, plaintiffs implicitly urge that this Court rule that there is no set of facts under which the exemption granted religious institutions by chapter 516 is not already constitutionally guaranteed. Such a ruling would unreasonably anticipate events and constrain future interpretations of the law. "In the absence of

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7/ As a threshold matter, plaintiffs' request that the Court conclude that St. 1989, c. 516, §§1, 14 are of no ultimate legal effect is contrary to the spirit of the principle that "[w]herever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous." International Organization of Masters v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority, 392 Mass. 811, 813 (1984), citing Casa Loma, Inc. v. Alcoholic Beverages Control Commission, 377 Mass. 231, 234 (1979).

a concrete fact situation, any ruling as to the extent of the power granted is likely to be either too narrow or too broad." Hadley v. Amherst, 372 Mass. 46, 52 (1977). Cf. Reilly v. School Committee of Boston, 362 Mass. 689, 695 (1972) (declaratory judgment inappropriate where facts of future controversy are unknown). This Court has refused to opine as to the constitutionality of an initiative petition on the grounds that the Court can act "with confidence that relevant considerations have not been overlooked" only "when the impact of a statute upon particular individuals, who have both the opportunity and the incentive to defend their rights by argument, and upon a set of definite facts established after genuine controversy, has been shown." Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 246 (1946). The Court cannot with confidence rule in this case, in the absence of a specific factual context and without a religious institution or a complainant before it, that the rights granted such institutions and individuals under chapter 516 are precisely those established by the First

Amendment.[8/]

Furthermore, were plaintiffs' proposed approach to Article 48 accepted, the Secretary of the Commonwealth (with the advice of the Attorney General) would be forced to perform a function far beyond either officer's mandate or qualifications. These officials would be required to review future proposed referenda not only to identify excluded matters but to engage in a far-searching comparison of the anticipated legal effects of the law with the effects of existing law.[9/]

8/ Proof of the complexity of the constitutional issues that may eventually be presented by chapter 516 may be found in the Plaintiffs' Memorandum in support of their request for a Preliminary Injunction at pages 15-25. In that Memorandum, plaintiffs trace out rationales for finding that chapter 516 impermissibly violates the establishment and supremacy clauses of the United States Constitution. Plaintiffs no longer make these arguments, even in the alternative, doubtless for the good reason that they contradict the argument that the exemption merely codifies the free exercise clause. The absence of these arguments before the Court only underscores, however, that this case provides too incomplete a set of facts and arguments for the sort of sweeping interpretation of chapter 516 sought by plaintiffs.

9/ The standard proposed by plaintiffs anticipates that the Secretary could construe some legislative enactments as wholly without

(footnote continued)

2. The Court should decline to determine whether the chapter 516 religious exemption is merely incidental to chapter 516.

a. Article 48 is designed to prohibit referenda on laws which include any section that relates to religion, religious practices or religious institutions.

As is demonstrated supra, sections 1 and 14 by their plain terms relate to religious institutions and religious principles. If these two sections alone had been passed by the legislature, that law would be indisputably beyond the referendum process. The placement of these sections of the law within a larger law does nothing to diminish the application of Part III, §2 ("The Referendum") of Article 48. "The excluded matters provision has consistently been read to mean that if any portion of a law relates to a matter excluded from the referendum process, the law in its entirety may not be the subject of a referendum petition." 1982/83 Op. Att'y Gen. No. 4, Rep. A.G., P.D. No. 12 at 88,

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(footnote continued)

legal meaning because they exclusively consisted of provisions that codified constitutional principles. In such a circumstance, plaintiffs' standard would require that the Secretary allow such laws onto the ballot on the grounds that the vote of the people to repeal the law would have no ultimate legal significance.

89 (1982).[10/] See also 1965/66 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 312 (1966).[11/]

This reading of the excluded matters provision is grounded in the views of the Framers of Article 48, who believed that the legislative process was such that even "small parts" of a law must be treated as if they are of ultimate significance. See Debates at 694-696, 699.

At the Constitutional Convention which adopted Article 48, the delegates specifically rejected a provision that would have permitted a referendum to be held on a part of a law. Debates at 3-6, 674-678, and 694-702. In so doing, they illuminated their view of the relationship of the parts and whole of a law. The author of the successful amendment striking provisions for partial referenda noted that:

10/ In this opinion, Attorney General Francis X. Bellotti found that St. 1982, c. 455 could not be submitted to the referendum process because three of its twelve sections related to the excluded matter of "compensation of judges." Id. at 88-89.

11/ In this opinion, Attorney General Edward W. Brooke found that the referendum process may be applied only to whole legislative enactments,

(footnote continued)

> You can easily imagine laws that are passed by the Legislature all of whose component parts are interrelated. If you take out one part you naturally throw the whole law out of kilter. Debates at 694 (Remarks of Mr. Bryant).

For example, "one small clause" of a law may be essential to that law's constitutionality. Id. Furthermore, sections of laws are carefully calibrated as to their effects on individuals and groups:

> Almost all laws hit people differently. They are framed possibly for the benefit of a certain class; at the same time they are likely to be in some way a detriment to another class. The two things are balanced by the Legislature . . . ." Id.

Such a balance is necessitated by the legislative process:

> It is perfectly obvious to any of you who have dealt with any legislation about which there is much of a dispute that a compromise nearly always results. Debates at 696 (Remarks of Mr. Youngman in support of Mr. Bryant's Amendment).

Because of this complex relationship, the Framers were skeptical of any claim that certain

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(footnote continued)

each part of which must not relate to an excluded matter. Accordingly, his analysis focused on the three (of eighty-one) potentially problematic sections of St. 1966, c. 14, and he acknowledged that if the legislation violated Part III of Article 48 "in any way...it may not lawfully be the subject of a referendum petition." Id. at 314 (emphasis supplied).

sections of a particular law were unimportant. As Mr. Bryant noted, "[h]ow can anybody take out a piece of that act and be sure that he has not destroyed the entire act?" Debates at 696.

In light of the Framers' views on the potential significance of small parts of laws, it is not surprising that Attorneys General and Secretaries of State have consistently refused to disregard "small parts" of a law in evaluating the law's status under Article 48. For the same reasons, this Court should not disregard sections 1 and 14 of chapter 516 in evaluating the status of chapter 516.

The concerns of the Framers also require rejection of plaintiffs' argument that "incidental" provisions of laws cannot exclude the law from a referendum under Article 48. In seeking to demonstrate that sections 1 and 14 of chapter 516 are "incidental" to the law as a whole, plaintiffs stress the legal ramifications of those sections, PB at 20-35, when compared to the law as a whole. PB at 35-42. However, the concerns that motivated the Article 48 exclusion of laws that relate to religion were not based upon the legal significance of the voters' decision, but upon the pernicious effects of

public debate about religious matters. See supra at 18-19. The legal significance of a measure and the amount of public debate it inspires are imperfectly correlated. Accordingly, even if plaintiffs were to demonstrate that the legal significance of sections 1 and 14 is relatively small, they would not have demonstrated that these sections are powerless to do exactly what the Framers sought to avoid: interject matters relating to religion into public debate. The only analysis of these sections that would allow plaintiffs to claim that the concerns of the Framers were not involved here would be a demonstration that these measures will not foster debate about the proper status of religion, religious practices, and religious institutions under Massachusetts' anti-discrimination laws. Plaintiffs have not undertaken such an analysis because it is impossible to prove such a proposition; only the fullness of time can demonstrate how public debate on a measure will evolve. The only way to avoid public debate on religious matters completely is to exclude systematically laws relating to religious matters from the politics of a referendum. This is precisely the approach chosen by the Framers of Article 48.

Two examples suffice to demonstrate the hazards implicit in plaintiffs' arguments regarding incidentality. Plaintiffs suggest that legislative codification of constitutional caselaw does not offend Article 48 even if it relates to religious practices. PB at 20-25. However, if the legislature were to pass a law encapsulating a First Amendment case, such as the court's disapproval of a creche display in County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989), and a referendum was allowed under Plaintiffs' theory, it seems likely that public debate regarding religion, religious practices and religious institutions would ensue, with the attendant disruption of civic harmony that the Framers of Article 48 sought to prevent. Plaintiffs also suggest that a law with a principal purpose that does not involve an excluded subject may be subject to a referendum even if sections of the law relate to religious matters. PB at 35-42. However, if a law with an inoffensive principal purpose were accompanied by one short provision regarding a topic such as the tax status of parochial schools, it seems likely that public debate regarding religion, religious practices and

religious institutions would ensue, with the attendant disruption of civic harmony that the Framers of Article 48 sought to prevent. As these examples make clear, the only way to effectuate the Framers' intent to exclude religious matters from public debate on referenda is to exclude from the ballot any measure that relates to religion, religious practices or religious institutions.

It should be noted that a decision that chapter 516 relates to religion, religious practices or religious institutions will not insulate the bulk of chapter 516 from repeal by the voters. Plaintiffs are free to submit an initiative petition proposing a new law to repeal or amend the statutory provisions added by chapter 516 other than those that relate to religion. While the Attorney General cannot certify in advance that such an initiative petition would meet all of the legal requirements of Article 48, it obviously would avoid the offense given under the religious exclusion in this case. Requiring that the plaintiffs pursue this course could allow for partial repeal of chapter 516 while serving the Framers' purpose of keeping divisive religious

issues away from public debate on ballot questions.

b. The incidentality test which has been developed for the Article 48 "powers of courts" exclusion does not apply to the Article 48 religious exclusion.

Plaintiffs insist that a law may relate to a subject excluded from the initiative or referendum and still be placed upon the ballot if the offending sections are only "incidental" to the measure's "main thrust." PB at 14. In so doing, plaintiffs seek to make an exception to typical Article 48 standards into a general rule. An incidentality test has been developed exclusively for the Article 48 "powers of courts" exclusion.

In interpreting the exclusion of laws that relate to religion, religious practices or religious institutions, the Court has stated that "a measure to be excluded . . . must relate distinctively 'to religion, religious practices or religious institutions' . . . ." Opinion of the Justices, 309 Mass. 553, 558 (1941). A law distinctively relates to religion if it differentiates on the basis of religious views or religion is a factor in the law's application. Id. at 558-59. No further inquiry

into the main thrust of the measure is required by this standard.

Similarly, with regard to the Article 48 exclusion of laws making appropriations, the Court has asked only if the appropriation is a "material part" of the law. Ward v. Coletti, 383 Mass 99, 107 (1981); see also Powell v. Cole-Hersee Co., 26 Mass. App. Ct. 532, 535 (1988) ("a law is not subject to referendum if any significant part relates to an excluded matter"). If the offending provision is a material part of the law, the law may not be made subject to the referendum process and there is "no occasion for getting into the metaphysics of a discussion about whether that aspect was 'main' or 'not main.'" Ward at 108. The Ward opinion follows reasoning employed in Yont v. Secretary of the Commonwealth, 275 Mass. 365 (1931), which excluded a law from the referendum because portions of the law made an appropriation. The Yont Court recognized that its approach to Article 48 would allow for a single provision, even if utterly unrelated to the remainder of the law, to exclude the law from the referendum process:

> [t]he interpretation here set forth will enable the General Court to nullify the

> effect of art. 48 of the Amendments by tacking to any law an appropriation . . ." Id. at 369

However, such a policy concern "cannot override the plain meaning of the pertinent words of the Amendment [Article 48]. Moreover, it cannot be presumed that the legislative department of the government will be actuated by unworthy motives or enact laws as a cover for ulterior aims." Id.[12/]

Plaintiffs' proposed standard has been applied solely to the Article 48 exclusion of laws that relate to "the powers, creation, or abolition of courts." See Commonwealth v. Yee, 361 Mass. 533, 538 (1972); Cohen v. Attorney General, 354 Mass. 384, 387-88 (1968); Horton v. Attorney General, 269 Mass. 503, 511 (1929) (all construing the powers of courts exclusion). The nature of the incidentality test is set forth in Horton:

12/ Such a presumption would be particularly inappropriate here, as the sections of chapter 516 that relate to religion, religious practices or religious institutions were proposed by an opponent of the bill, who presumably would not oppose its potential repeal through the referendum. Compare Journal of the Senate for June 28, 1989 (pp. 805-06) (amendment by Senator Brennan); and Journal of the Senate for October 30, 1989 (p. 1312) (Senator Brennan voting against enactment of chapter 516).

> [a] general law covering a subject disconnected with courts in its main features does not come within the prohibition of said art. 48 already quoted because, in an incidental and subsidiary way, the work of the courts may be increased or diminished or changed. 269 Mass. at 211.

This test is an exception to the courts' general approach to the exclusions under Article 48, and is based upon compelling logic. Every law, by its enforcement, will change the work of the courts. In order to avoid excluding "virtually any change in the law at all" from the ballot, the Court has established a higher threshold for the powers of the court exclusion. Massachusetts Teachers Association v. Secretary for the Commonwealth, 384 Mass. 209, 226 (1981). Thus the Court has analyzed whether or not the change in the work of the courts is part of the main design of a measure or simply a detail or by-product. Yee at 538 (criminalization of conduct); Cohen at 387 (redistricting to be accomplished by commission of which five members would be appointed by the Chief Justice). Such incidental effects upon judicial powers do not exclude a law or proposed law from the ballot. Opinion of the Justices, 375 Mass. 795, 814-15 (1978).

This judicially-created incidentality analysis prevents the powers of courts exclusion

from swallowing the rule that laws are generally subject to the referendum. No other exclusion has the same potential to eviscerate Article 48, and so application of the incidentality test to any other exclusion is neither precedented nor necessary.

Of course, the exclusion of laws relating to religion could prevent all referenda if the Court routinely accepted a plaintiff's claim that all conduct has religious significance. The Court saw and dealt with this problem in Opinion of the Justices, 309 Mass. 553 (1941). In allowing onto the ballot an initiative petition to allow for the teaching of birth control in medical schools, the Court noted that:

> [s]ome or many persons may regard all conduct as involving obedience or disobedience to the will of the Creator. But it is apparent that it was not intended by the provision of the Amendment here in question to exclude from the initiative all measures relating to conduct . . . . [S]uch an interpretation would to a large extent be destructive of the right to the popular initiative . . . . [A] measure to be excluded . . . must relate distinctively 'to religion, religious practices or religious institutions' . . . . Opinion at 558.

There is no need and there is no authority, either explicit or implicit, for importing incidentality analysis into the exclusion for

religion, religious practices or religious institutions; the potential for this exclusion to swallow the rule is quelled so long as courts require that the law's relationship to religion be "distinctive" rather than derivative of a particular view of all conduct.

The history and framework of Article 48 also argue against new applications of incidentality analysis. The history of Article 48 indicates that these the powers of courts exclusion is uniquely suited to incidentality analysis. The religious exclusion was designed to keep religious matters out of public discourse. See supra at 18-19. Because the Secretary and the courts cannot predict the course of public debate, if any provision of a law deals with religious matters the law must be kept off of the ballot. See supra at 28-29. By contrast, the judicial powers exclusion was designed to protect the integrity of the judiciary. Debates at 232-32, 789-90. The effect of a law upon the judiciary is a legal issue that the courts are easily able to consider. See, e.g., Commonwealth v. Sacco, 255 Mass. 369, 411 (1926); deLeo v. Childs, 304 F.Supp. 593, 596

(D. Mass. 1969) Incidentality analysis is suited to the powers of courts exclusion but not to the religious exclusion.

The structure of Article 48 also argues against expanded use of incidentality analysis. Such analysis requires that the "chief purpose" of a law be identified so that the incidentality of particular provisions to that purpose may be gauged. Cohen v. Attorney General, 354 Mass. at 387. This task is relatively simple with regard to laws initially proposed under Article 48, but is often impossible with regard to laws subject to the referendum. Initiative petitions must, under Article 48, have a "general purpose" that establishes that each of the petition's provisions is "related or mutually dependent." See, e.g., Massachusetts Teachers Association v. Secretary of the Commonwealth, 384 Mass. 209, 218-221 (1981). However, there is no such requirement for laws passed by the legislature. Accordingly, laws may contain provisions that are not related or mutually dependent, and it may be impossible to determine which of several unrelated provisions properly qualifies as the "chief purpose" of the law. Expanding the

incidentality analysis to the religious exclusion from the referendum will force the Secretary (and ultimately the courts) to discern a single "chief purpose" of legislation that may have no such single purpose. Alternatively, the Secretary (and ultimately the courts) will be forced to enumerate the several "chief purposes" of a law, and thereby preordain whether or not particular provisions are incidental or chief purposes. This poor fit between the incidentality analysis and the referendum argues against any expansion of its use to the exclusion for religion, religious practices or religious institutions.

C. If the Court looks beyond the plain terms of chapter 516, it will find that chapter 516 relates to religion, religious practices or religious institutions.

1. The religious exemption in chapter 516 is not coextensive with the First Amendment.

It is certainly true that both the First Amendment and sections 1 and 14 of chapter 516 affect the extent to which religious institutions are subject to the anti-discrimination proscriptions of G.L. c. 151B. While some of the language in sections 1

and 14 is similar to some of the language used in cases interpreting the First Amendment's application to anti-discrimination statutes, see Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Madsen v. Erwin, 395 Mass. 715 (1985), the language of the cases and the statute is far from identical. Moreover, the courts and the legislature have used these words in markedly different contexts. In this way, the legislature established immunity from Massachusetts' anti-discrimination laws for religious organizations that is much broader than that provided by the First Amendment. Accordingly, sections 1 and 14 are not "merely a statutory repetition of a basic constitutional principle." PB at 25.

The cases which plaintiffs cite as coextensive with sections 1 and 14 contain limiting principles that do not apply to sections 1 and 14. In Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), a defrocked bishop sued the Church and sought "to have himself declared the true Diocesan Bishop." Serbian Eastern Orthodox at 707. In

rejecting the Illinois Supreme Court's characterization of the Bishop's defrocking as "arbitrary," the U.S. Supreme Court held that:

> no 'arbitrariness' exception -- in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations -- is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. Id. at 713.

In Madsen v. Erwin, 395 Mass. 715 (1985) this Court affirmed summary judgment granted to the Christian Science Monitor against an employee's claim of sexual and affectional preference discrimination. In so holding, the Court made specific factual findings that colored its analysis. First, the Court found that "the Monitor is a religious activity of the Church." Id. at 722. The Court then concluded that:

> [o]n the affidavits, the decision to fire Madsen because of her sexual preference can only be construed as a religious one, made by a Church as employer. Thus we must defer to that decision. '[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.' Id. at 723, quoting Serbian E. Orthodox Dicoese.

Madsen does not define rights of employers other than churches, nor the rights of employees engaged in secular activities.

Chapter 516 uses similar but not identical language to that chosen by the Supreme Court in Serbian Eastern Orthodox and echoed by this Court in Madsen.[13/] Chapter 516 provides special status to:

> any action taken with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established and maintained. St. 1989, c. 516, §1.

These words are literally different from those found in the First Amendment cases. Gone are the limiting principles found in the Serbian Eastern Orthodox and Madsen holdings that deference is due only to "the decisions of the highest judicatories of a religious organization" and that the organization must be one of "hierarchical polity." The deference granted "decisions" of a ranking body is accorded by the statute to "any action." Added,

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13/ Of course, if the Madsen formulation is more generous than the First Amendment requires, chapter 516 is even further removed from the dictates of the Constitution. Cf. Madsen at 732-733 (dissent of O'Connor, J.).

as well, is the word "employment"[14/] and the phrase "which are calculated to promote the religious principles for which it is established or maintained." These words add new dimensions to the Madsen language.[15/]

Even more importantly, the exemption in chapter 516 applies to a much broader group of institutions and employees than is required by the First Amendment. The language of chapter 516 suggests a four-fold test for courts to apply in evaluating the coverage of chapter 151B:

14/ Madsen involved employment, but its holding is confined to employment by a church. Other employment, even by an organization open only to members of the church, is not exempted from civil law by the First Amendment. EEOC v. Pacific Press Publishing Association, 676 F.2d 1272, 1281 (9th Cir. 1982) (contrasting church disciplinary actions with discharge from employment by religious organization).

15/ The ultimate legal effect of these additional words is unclear, as they suggest both an expansion and a contraction of the Court's holding. The word "employment" appears to place additional secular activities within the exemption. However, the limitation of the exemption to actions taken pursuant to the religious principles "for which [the organization] is established or maintained" may prevent application of the exemption to otherwise secular businesses operated by religious organizations.

This ambiguity, like any other concern the Court identifies with the interpretation of this new statutory language, simply underscores the inappropriateness of plaintiffs' argument that these sections merely restate what is already known about religious institutions' status under the First Amendment.

1) Whether the organization involved is religious or denominational, or operated for charitable and educational purposes and operated, supervised or controlled by or in connection with a religious organization;

2) Whether the organization limits membership, enrollment, admission, or participation to members of that religion;

3) Whether the action involved is with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law; and

4) Whether the action is calculated by the organization to promote the religious principles for which it is established or maintained.

If all four criteria are met, the prohibitions against discrimination found in G.L. c. 151B and "any general or special law" do not apply.

This four-pronged test for exemption is different in content and form from any First Amendment analysis. It reaches far more organizations and employees within these organizations than does the First Amendment, and unlike First Amendment analysis, this exemption fails to balance the interests served by the

exemption against the public interest in application of the underlying anti-discrimination statute. Like the First Amendment, chapter 516 protects matters at the core of ecclesiastical concern from the reach of civil anti-discrimination laws. However, the chapter 516 exemption extends far beyond that core, and so far beyond the protections established by the First Amendment.

Chapter 516 exempts far more organizations than the First Amendment. The chapter 516 exemption applies to any organization that is operated in connection with a religious organization and which limits participation to members of that religion. Courts interpreting the First Amendment have been far more selective in exempting organizations. In Madsen, the plaintiff "was, in fact, an employee of the Church." 395 Mass. at 721, and the Court carefully noted:

> [N]ot every endeavor that is affiliated, however tenuously, with a recognized religious body may qualify as a religious activity of that body and come within the scope of the protection from government involvement that is afforded by the First Amendment." Madsen at 722, n.2, quoting Feldstein v. Christian Science Monitor, 555 F. Supp. 974, 978 (D. Mass. 1983).

The federal courts have found that the First Amendment does not exempt organizations affiliated with churches from federal anti-discrimination laws. EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 287 (5th Cir. 1981) ("an exemption for the Seminary's support staff and other nonministers is not constitutionally compelled."); see also EEOC v. Pacific Press Publishing Association, 676 F.2d 1272, (9th Cir. 1982); EEOC v. Mississippi College, 626 F.2d 477, 489 (5th Cir. 1980) ("the application of [anti-discrimination law] to educational institutions such as Mississippi College does not violate the free exercise clause of the first amendment."). In each of these cases, the First Amendment did not exempt an institution which generally met the criteria established for the chapter 516 exemption from Massachusetts' anti-discrimination laws. Southwestern Baptist at 279-80, 284-85; Pacific Press at 1274; Mississippi College at 478-89.

Within the organizations to which it applies, the chapter 516 exemption deprives far more employees of civil protections than does

the First Amendment. It is true that when an employee is engaged in religious activities, the First Amendment may prohibit civil interference. See, e.g., Madsen at 719-22. However, nothing in the chapter 516 exemption limits its application in a manner that would allow employees who are employed in essentially secular positions to seek redress under Massachusetts' anti-discrimination laws. The First Amendment does not deny civil protection to such employees. Id. at 733 (dissent of O'Connor, J.), citing EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d at 281-87.

Even though the explicit terms of chapter 516 exempt actions not protected by the First Amendment, plaintiffs nonetheless maintain that only "purely ecclesiastical decisions" are affected by the exemption. PB at 31. This assertion must rely upon the fourth criterion of chapter 516 -- that the action involved must be "calculated . . . to promote the religious principles for which [the organization or its affiliate was] established." As such, it ignores the distinction between employment actions which are "purely ecclesiastical" and

employment actions which "further the religious principles of the organization" but are not "purely ecclesiastical." Chapter 516 exempts both types of actions. The First Amendment exempts "purely ecclesiastical" decisions, Serbian Eastern Orthodox at 709, but not "disciplinary actions based on religious doctrine." Pacific Press at 1275.

As demonstrated above, First Amendment analysis is sensitive to differences -- in religious organizations, in types of employees, and in types of actions. These nuances are important to First Amerdment analysis because such analysis involves balancing private burdens and public interests. See, e.g., EEOC v. Mississippi College, 626 F.2d 477, 486-89 (5th Cir. 1980); EEOC v. Pacific Press Publishing Association, 676 F.2d 1272, 1279-82 (9th Cir. 1982), citing Lemon v. Kurtzman, 403 U.S. 602 (1971) (free exercise clause) and Wisconsin v. Yoder, 406 U.S. 205 (1972) (establishment clause). Chapter 516 is not "merely a statutory repetition" of this constitutional principle because it replaces these balancing tests with an exemption for "any action" that meets the

statutory criteria. Such an exemption does not codify the courts' interpretation of the First Amendment.

2. The broad religious exemption from Massachusetts' anti-discrimination laws provided religious institutions by chapter 516 is not a merely incidental part of chapter 516.

Chapter 516 amends Massachusetts' anti-discrimination laws in two ways: it adds a prohibition on discrimination on the basis of sexual orientation, and it expands the exemption provided religious institutions from those laws. As is detailed extensively above, see supra at 2-7, 14-18, and 39-49, this expansion of the rights of religious institutions is substantial and significant. This expansion is not confined to discrimination on the basis of sexual orientation. Instead, it affects religious institutions' status under every prohibition of discrimination in "the provisions of any general or specific law." Correspondingly, the rights of persons discriminated against by religious institutions are significantly constricted, and the persons affected are not merely those who claim discrimination on the basis of sexual

orientation. This expansion of the rights of religious institutions under Massachusetts' anti-discrimination laws is simply too important to be incidental to chapter 516 as a whole. Cf. Powell v. Cole-Hersee Co., 26 Mass. App. Ct. 532, 535-36 (St. 1985, c. 572 excluded from the referendum because three of the seventy-two sections were excluded matters).

Admittedly, the legislature that passed chapter 516 sought to change the legal status of discrimination on the basis of sexual orientation. It is equally apparent, however, that such discrimination was not the legislature's sole focus. To attack discrimination on the basis of sexual orientation, the legislature did not need to mention religious institutions at all. Alternatively, the legislature could have tailored the expanded religious exemption so that it would have applied exclusively to discrimination on the basis of sexual orientation. A law with either approach to religious institutions would have provided some basis for plaintiffs' argument that the law's reference to religious institutions and principles is only incidental to the law's main

purpose. PB at 35-42. However, chapter 516 reworks the general standards governing discrimination by religious institutions on the basis of race, sex, national origin, color, creed, or age. This legislative action is too separate and distinct from the prohibition of discrimination on the basis of sexual orientation to be deemed "incidental" to it.

It bears noting that sections 1 and 14 of chapter 516 would, standing alone, comprise a law not subject to the referendum. These sections would comprise a law. Cf. Paisner v. Attorney General, 390 Mass. 593 (1983) (distinguishing laws and legislative rules). Such a law would relate solely to the activities of religious institutions and the exercise of religious principles. As such, it would be excluded from the referendum process by Article 48. There is no justification in the text or purposes of Article 48 to hold that a law excluded from the referendum process may be transformed into a law which may be repealed if it is surrounded by other provisions of sufficient size and diverse subject matter.

Finally, there is a noteworthy relationship between the ways the new prohibition and the new exemption affect religious institutions. Chapter 516 as passed both adds and subtracts from religious institutions' responsibilities under Massachusetts' law. The new responsibility is to refrain from discriminating on the basis of sexual orientation. Even as limited by the exemption, chapter 516 imposes this duty upon some institutions connected with religious organizations.16/

Religious institutions would have received only new responsibilities from chapter 516 if the legislature had passed the law without any mention of religious institutions. Indeed, even a law prohibiting discrimination on the basis of sexual orientation and then exempting most of the activities of religious institutions from that prohibition would have exclusively added to the legal responsibilities of such institutions. The legislature that passed

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16/ As the Court noted in Madsen v. Erwin, 395 Mass. 715, 725 n.4 (1985), a religious organization was previously under no duty under G.L. c. 151B, §4(1) to refrain from discrimination on the basis of sexual preference.

chapter 516 instead opted to balance the responsibilities upon religious institutions imposed by the law with a reduction in the responsibilities of religious institutions under all of Massachusetts' anti-discrimination laws. That reduction is found in the expanded exemption of sections 1 and 14. The role of these sections as a counterweight to the law's effects on religious institutions is wholly disregarded by plaintiffs' characterization of the benefits provided religious institutions as incidental to the legislative scheme as a whole.

CONCLUSION

For the reasons stated herein, this Court should declare that chapter 516 of the Acts of 1989 "relates to religion, religious practices

or religious institutions" and so is excluded from the referendum process under Article 48.

Respectfully submitted,

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2004 WL 5684167 (C.A.1) (Appellate Brief)
United States Court of Appeals, First Circuit.

Michael WIRZBURGER, et al., Plaintiffs/Appellants,

v.

William F. GALVIN, et al, Defendants/Appellees.

No. 2004-1625.
August 11, 2004.

Brief

TABLE OF CONTENTS

Note: Table of Contents page numbers missing in original document

TABLE OF AUTHORITIES

Cases

STATEMENT OF JURISDICTION

This is an appeal from a final judgment entered by the United States District Court for the District of Massachusetts (O'Toole, D.J.) in favor of the defendants-appellees, who are William F. Galvin, named in his capacity as Secretary of the Commonwealth of Massachusetts, and other state officials, also named in their official capacities. Appendix of Plaintiffs-Appellants, pp. 25, 27-30 (hereafter abbreviated as "A. [page #]."). The plaintiffs invoked the federal question jurisdiction of the district court with respect to "claims arising under the U.S. Constitution and 42 U.S.C. § 1983." A. 39. Final judgment for the defendants entered on April 1, 2004. A. 25. Plaintiffs filed a notice of appeal on April 29, 2004. A. 25. The plaintiffs claim jurisdiction in this Court under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The Massachusetts Constitution provides two means by which its provisions can be amended - an initiative petition process and a legislative process. Under the legislative amendment process, any legislator may introduce a constitutional amendment on any subject whatsoever. An initiative, which is introduced by a citizen petition, may only propose a measure that does not contain any of a variety of "excluded matters" that are enumerated in the initiative provision. Mass. Const. Amend. Art. 48, Init., pt. 2, § 2, ¶ 1.

The plaintiffs in this action sought, by an initiative petition, to amend the Massachusetts Constitution, specifically its Anti-Aid Amendment, to permit public funding for students attending private schools, including religious schools. Plaintiffs do not dispute that their petition addressed two matters excluded under Article 48: initiatives that seek to amend the Anti-Aid amendment and laws that relate "to religion, religious practices or religious institutions." Instead, plaintiffs contend that these limitations on direct, popular lawmaking violate their rights under the Free Speech and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

In this appeal, the issues are:

1. Whether the challenged Article 48 exclusions violate plaintiffs' rights under the Free Speech Clause, where the exclusions simply limit the subjects that may be addressed in a particular lawmaking process but place no restrictions whatsoever on speech associated with the political process.

2. Whether the religious-institutions exclusion violates plaintiffs' rights under the Free Exercise Clause, where the exclusion does not burden plaintiffs' religious beliefs, status, or conduct, but simply removes lawmaking relating to religion or religious institutions from the initiative process altogether, regardless of a measure's sponsor or its impact - favorable or unfavorable - on religious persons or institutions.

3.Whether the challenged Article 48 exclusions violate plaintiffs' rights under the Equal Protection Clause, where both exclusions apply equally to measures proposed by any group or individual, regardless of their religious affiliation or lack thereof, and evenhandedly bar initiatives that would disfavor religion as well as those that might benefit religion.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo. Euromotion, Inc. v. BMW of North America, Inc.,* 136 F.3d 866, 869 (1st Cir. 1998). In exercising such review, the Court examines the record in the light most favorable to the party opposing summary judgment, indulging all reasonable inferences in that party's favor. *Id.* at 869. In order to avoid summary judgment, however, where the nonmoving party has the burden of proof it must produce evidence on which a reasonable finder of fact, under the appropriate proof burden, could base a verdict for it; if that party cannot produce such evidence, the motion must be granted. *Celotex Corp. v.Catrett,* 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986).

STATEMENT OF THE CASE

This action was filed on March 3, 1998, challenging both the Anti-Aid Amendment (art. 46, § 2) and the religious-institutions and Anti-Aid exclusions in Article 48. A. 8, 27-45. On September 2, 1998, the district court ordered, with the consent of all parties, that, pending a final decision in the case, the Secretary of the Commonwealth release blank petition forms to permit the plaintiffs to collect signatures in support of their proposed initiative (despite the Attorney General's earlier refusal to certify it). A. 50. After they collected the requisite number of signatures, the plaintiffs moved for a preliminary injunction on April 6, 2000, to require the Attorney General to certify their petition, despite its non-compliance with Article 48. A. 15. On May 5, 2000, the district court entered a memorandum and order denying plaintiffs' motion for preliminary injunction finding that the plaintiffs had not established a reasonable likelihood of success on the merits of their claims under the Free Speech, Free Exercise and Equal Protection Clauses. A. 17.

On February 12, 2001, the district court entered an order granting the defendants' motion to dismiss, for lack of standing, the plaintiffs' claims against the Anti-Aid Amendment. A. 18, 51-60.[1] On November 7, 2002, the plaintiffs moved for summary judgment on their claims against the Anti-Aid and religious institutions exclusions. A. 21. On December 19, 2002, the defendants filed a cross-motion for summary judgment. A. 21, 621. *See* A. 635-55 (Def. Stmt. of Material Facts under Local Rule 56.1). The summary judgment motions were heard on April 8, 2003. A. 24. On April 1, 2004, the district court entered judgment in favor of the defendants, granting their motion for summary judgment and denying plaintiffs' motion. A. 25. *See* A. 61-65 (Mem. and Order Granting Defendants' Motion for Summary Judgment). In its final judgment, the district court entered a declaration that "the Anti-Aid and Religious Exclusions contained in Amendment Article 48 to the Massachusetts constitution are not invalid as violative of the First and Fourteenth Amendments to the United States Constitution." A. 25, 65.

The plaintiffs filed their notice of appeal on April 29, 2004. A. 25.

STATEMENT OF FACTS

The Plaintiffs' Initiative Petition

On July 28, 1999, Plaintiff Susan Wirzburger ("Wirzburger"), along with fourteen others, submitted a citizen initiative petition ("Initiative Petition 99-2") to the Attorney General that would modify Massachusetts' Anti-Aid Amendment by adding a sentence to permit the Commonwealth and its political subdivisions to make "loans or grants, or providing tax benefits, to students or parents or guardians of students attending private primary, secondary or higher education institution[s], regardless of any religious affiliation or character of such institutions." A. 500-501, 520 (Wirzburger Decl., ¶ 8 and Ex. F.)[2] The plaintiffs

are not members of a discrete religious group. Of the three plaintiff families, the Boyettes are Pentecostal; the Wirzburgers are Roman Catholic; and the Zubrickis state that they believe in the importance of Catholic teachings but do not claim to be Catholic. A. 28-30 (Amended Complaint, ¶¶ 3-5.)

By letter dated September 1, 1999, the Attorney General informed the signers of the petition that:

[he was] unable to certify that the proposed constitutional amendment "contains only subjects ... which are not excluded from the popular initiative," as would be required for the petition to proceed in the Article 48 process. Art. 48 Init., pt. 2, § 3. Specifically, the petition seeks to amend the state's "Anti-Aid Amendment," Mass. Const. amend. art. 18, which Article 48 expressly forbids, and the petition also explicitly relates to "religious institutions," another matter expressly excluded from the initiative process by Article 48.

A. 522 (Wirzburger Decl., Ex. G). Pursuant to this Court's Order, dated September 2, 1999, allowing Plaintiffs' Assented-to Motion for a Preliminary Injunction, the Attorney General released a summary of Initiative Petition No. 99-2 to the Secretary of the Commonwealth, and the Secretary released blank petition forms to the Plaintiffs. A. 500.

The plaintiffs and others proceeded to gather signatures for Initiative Petition No. 99-2. A. 500-502 (Wirzb. Decl. ¶ 11). On December 15, 1999, the Secretary of the Commonwealth notified them that they had submitted 78, 342 properly certified signatures, more than the 57,100 signatures required. *Id.* The Secretary, pursuant to this Court's injunction, then transmitted Initiative Petition 99-2 to the Clerk of the House of Representatives. *Id.* Thereafter, 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. A. 502 (Wirzb. Decl. ¶ 12.) Thereafter, the joint session of the Legislature that convened in May 2000 did not act on Initiative Petition 99-2.

The Article 48 Amendment Process

Article 48 established two alternative mechanisms for amending the Massachusetts Constitution - an initiative petition process and a legislative process. Under the legislative amendment process, any legislator may introduce a constitutional amendment on any subject whatsoever. Article 48, Init., pt. 4, § 1. If consideration of a legislator's proposed amendment is called for by vote of either house, then a joint session of the House and Senate is convened and the proposal laid before it by the second Wednesday in May. *Id.* § 2 (as amended by amend. art. 81, § 1). If the proposed amendment is approved by majority roll-call vote of the joint session, it is forwarded to the next Legislature. *Id.* § 4. If in the next Legislature a joint session of the House and Senate also approves the amendment by majority roll-call vote, it is submitted to the people, and if ratified by majority vote, it becomes effective. *Id.* § 5.

An initiative petition for a constitutional amendment may properly be "introduced into the [Legislature]," id. § 1, if, inter alia, it has been signed by the required number of qualified voters and has the Attorney General's certification that the petition contains no excluded matters. Article 48, Init., pt. 2, §§ 3, 4. Thereafter, the petition must be laid before a joint session of the Legislature by the second Wednesday in May, without any requirement that either the House or Senate have voted to call for its consideration. Article 48, Init., pt. 4, § 2. If approved at the joint session by roll-call vote of "not less than one-fourth of all the members elected," *i.e.,* 25% of the membership, it must be forwarded to the next Legislature. *Id.* § 4. If taken up and again approved by 25% roll-call vote of the membership at a joint session of the next Legislature, the proposed initiative amendment must be submitted to the people for ratification. *Id.* § 5.

The initiative amendment process is thus a powerful alternative to the legislative amendment process, requiring submission of the proposed amendment to the voters even if 75% of the voters' elected representatives, in roll-call votes, have twice voted the proposal down as unwise. The excluded-matters provisions of article 48 are a structural check on the use of this form of popular lawmaking. Article 48 provides that an initiative petition cannot propose any measure that relates:

to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth ....

Art. 48, Init., pt. 2, § 2, ¶ 1. In addition, the Anti-Aid Amendment, as approved following the Constitutional Convention of 1917, may not be the subject of an initiative amendment. Id., § 2. Also declared off-limits are any measures inconsistent with ten individual rights protected by the Commonwealth's Declaration of Rights. *Id.* ¶ 3. Finally, the Article 48 exclusions are themselves excluded from the initiative process. Id., ¶ 4.[3]

Before the enactment of Article 48, a constitutional amendment could be adopted only by first being proposed in the Legislature, approved by a majority of Senators and two-thirds of the Representatives, referred to the next session of the Legislature for similar approval, and then submitted to the voters for ratification. Mass. Const. amend. art. 9. This procedure was repealed in 1918 by Article 48. *See* Amend, art. 48, pt. 8.

The Anti-Aid Amendment

The plaintiffs' proposed initiative measure would have amended the 18th Amendment to the Massachusetts Constitution - commonly called the Anti-Aid Amendment. A. 522 (Wirzburger Decl., Ex. G). That provision states, in part, that:

No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both .... and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Mass. Const. Amend. art. 18, as amended by arts. 46 and 103. The present day version of the Anti-Aid Amendment - barring use of public money "for the purpose of founding, maintaining or aiding" private institutions generally - was enacted in 1917 (as Amend. art. 46) and replaced the original Eighteenth Article of Amendment enacted in 1855. *See* M.G.L.A. Const. Amend. Art. 18, Historical Notes (West 1997).[4] The original Article 18 barred only public funding of religious schools, providing that "such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools." *Id.*[5]

In 1974 amendment article 103 was adopted, altering section 2 of the Anti-Aid Amendment (Amend. art. 46, § 2) to permit the Commonwealth to make grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions. The 1974 amendment also eliminated from section 2 of the Anti-Aid Amendment the 1917 language prohibiting public aid to schools and other institutions "whether under public control or otherwise, wherein any denominational doctrine is inculcated," leaving in place the wholly neutral prohibition enacted in 1917 on aid to schools and private institutions that are not "publicly owned and under the exclusive control, order and supervision of public officers or public agents ...."

History of Article 48's Anti-Aid and Religious-Institutions Exclusions

The Constitutional Convention debates plainly show that 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. The debates also demonstrate that the religious-institutions exclusion was not intended to be hostile to religion, but merely to keep out of the initiative lawmaking process those proposals affecting such institutions in any way.

Before the Anti-Aid Amendment had even been submitted to the voters for ratification in November of 1917, the Constitutional Convention had turned its attention to the question of the initiative and referendum. 2 *Debates* at 15 (showing debate on initiative and referendum beginning on Aug. 7, 1917). From the outset the Convention recognized that there were some subjects that were unsuitable for and should be excluded from the popular initiative and referendum; the first draft reported to the Convention excluded any "law, the operation of which is restricted to a town, city or other political division of the Commonwealth." 2 *Debates* at 4, 5.[6] The first draft also excluded from the referendum certain laws making appropriations for the Commonwealth. 2 *Debates* at 5.[7] A proposal was soon made, and after amendment was adopted, to prevent the initiative from being used to limit, or pass laws inconsistent with, ten specified individual rights set forth in the Declaration of Rights.[8]

Against this background, but still prior to the election at which the Anti-Aid Amendment was ratified (*see Journal* at 371), Mr. Swig of Taunton suggested that "no law relating to religion, religious practices or religious institutions" should be subject to the initiative. 2 *Debates* at 766. Mr. Swig wished to remove religious controversy from the initiative and referendum:

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

Id. at 767. Mr. Parker of Lancaster urged the adoption of the amendment, noting that "it seems to me to be perfectly in harmony with ... the wise provisions of the anti-aid amendment finally so overwhelmingly adopted by this Convention. *To the end that provision may be more securely protected in our constitutional provisions* I myself deem it wise that [the religious exclusion]... should be adopted." *Id.* at 768 (emphasis added). After several prominent supporters of the Anti-Aid Amendment agreed that it was best to exclude all religious matters from the new initiative process, id. at 768-69 (remarks of Messrs. Curtis and Anderson), the exclusion was adopted. *Id.* at 770. Exclusions of several other subject matters were added as well.[9]

Shortly after the 1917 election at which the Anti-Aid Amendment was ratified, the Convention realized that it had not gone far enough in protecting the compromise embodied in that Amendment - barring public funding of both religious *and* non-religious private institutions - from being too easily overturned by the people. The exclusion of initiative proposals relating to "religious institutions," adopted before the election, was discovered to be insufficient, as it would still allow an initiative petition to repeal or amend that part of the new Anti-Aid Amendment that prohibited aid to private *non-religious* institutions. Mr. Curtis, a Protestant, Republican delegate from Boston, explained that limiting the exclusion in such a manner would render:

immune from the operation of the initiative and referendum that part of the new eighteenth amendment stating that no grant or appropriation shall be made to a school wherein a denominational doctrine is inculcated. The remainder of the eighteenth amendment, prohibiting appropriations to non-sectarian schools and institutions not under public control is not affected.

The committee on Bill of Rights in framing the anti-aid amendment attempted to treat all institutions alike. Is it fair to apply the initiative and referendum to one class and place the rest beyond its reach?

I would not be a party to placing in the Constitution anything that would discriminate against the Catholic church or its institutions. If the Convention wishes to exclude the entire eighteenth amendment, let it do so, but it should not exclude a part and leave the rest subject to the initiative and referendum.

My interpretation of the vote on election day is that the people wished to settle once for all the entire question of public aid to private institutions. Treat all institutions alike. I trust you will not leave the initiative and referendum resolution in such condition that it is applicable to one class of institutions and inapplicable to all others.

2 *Debates* at 981-82. Mr. Pelletier, a Catholic delegate and Anti-Aid Amendment supporter (I *Debates* at 95-98; Journal at 187), stated that he agreed with Mr. Curtis: if the religious aspects of the Anti-Aid Amendment were to be placed off limits to amendment by initiative petition, the non-religious aspects should be as well. 2 Debates at 982-83.

Therefore, on November 21, 1917, Mr. Curtis moved an amendment to this effect, which was modified to read, "Neither the eighteenth amendment of the Constitution, as approved and ratified to take effect on [October 1, 1918], nor this provision for its protection, shall be the subject of an initiative amendment." 2 *Debates* at 996-97. The amendment was adopted by a vote of 175 to 106, id. at 997; *see Journal of the Constituitonal Convention, 1917-19* at 511, 529-31 (1917) (hereafter Journal), and now appears as amend. art. 48, Init., pt. 2, § 2, ¶3.

SUMMARY OF ARGUMENT

1. The plaintiffs have failed to establish that the Anti-Aid and religious institutions exclusions violate the Free Speech Clause of the First Amendment. Plaintiffs seek to require the Attorney General to certify their initiative petition *solely* to give it legal force as the first step in the state constitutional amendment process. But the process provided under Article 48 is a binding lawmaking function - it is not "speech" subject to First Amendment scrutiny. And the exclusion of certain subjects from this binding lawmaking process does not restrict speech about those subjects; indeed, Article 48 places no restrictions whatsoever on plaintiffs' speech. In short, the Free Speech Clause does not grant citizens the right to set a particular lawmaking process in motion, even though the Clause provides substantial protection to speech *associated with* the lawmaking processes. Thus, under the First Amendment the Commonwealth may provide for lawmaking by citizen initiative while excluding from that process measures addressing subjects better left for consideration by the Legislature.

2. The religious institutions exclusion does not burden the plaintiffs' religious beliefs, practice, or status, and therefore does not violate their rights under the Free Exercise Clause of the First Amendment. The exclusion applies to any measure relating to "religion, religious practices or religious institutions," while leaving all such measures for full consideration in the legislative process. The exclusion is neutral on its face and in its operation. It bars measures that would harm religious interests and those that might benefit such interests, and applies to measures proposed by any group or individual, regardless of their religious affiliation or lack thereof. Indeed, as likely as not the exclusion *protects* religious interests from attack in the popular lawmaking process, in which measures that cannot gamer support from a majority of legislators may nonetheless be put to the people for a vote.

The plaintiffs have not shown that the religious institutions exclusion burdens the observation of a central religious belief or practice, as they must to establish a violation of the Free Exercise Clause. The cases are clear that the plaintiffs do not engage in "religious conduct" by seeking to enact laws that would provide public assistance to religious schools. Nor is any plaintiff specially affected by virtue of her "status" as a proponent of religious education, since the exclusion applies equally to all proponents of measures relating to religion (including proponents with anti-religious objectives).

3. Neither the Anti-Aid exclusion nor the religious institutions exclusion violates the Equal Protection Clause. The Anti-Aid exclusion bars use of the initiative process to amend any aspect of the Anti-Aid Amendment, whether related to religion or not, and thus does not classify based on religion. Similarly, the religious-institutions exclusion evenhandedly bars initiatives that would disfavor religion as well as those that might benefit religion and, consequently, does not discriminate based on

religion. The cases upon which plaintiffs rely to support their equal protection claim are entirely inapplicable; unlike the Article 48 exclusions, such cases involve government acting to disadvantage a particular minority group by restructuring the political process *solely* to make it more difficult to enact laws or implement policies to protect that group. Because neither of the challenged exclusions discriminates based on a suspect classification or burdens any fundamental right, both are subject only to rational basis scrutiny.

The challenged exclusions are rationally related to several legitimate governmental interests. The Anti-Aid exclusion protects the compromise embodied in the Anti-Amendment from being too easily overturned by direct popular action, which might open the public treasury to the demands of any variety of private institutions (whether religious or not). This exclusion also protects from direct popular action the Anti-Aid Amendment's state constitutional guarantee of free exercise of religion, which has vitality independent of the cognate clause in the federal constitution. The religious institutions exclusion prevents the initiative process from being used to make laws that, while perhaps politically popular, might treat particular religious institutions, or such institutions generally, in a manner that violates the state or federal Free Exercise or anti-Establishment guarantees. Second, and independently, the religious-institutions exclusion rationally serves a legitimate governmental interest in preventing direct popular lawmaking on potentially controversial and divisive issues - measures that could exacerbate religious divisions or lead to unwise laws - reserving such lawmaking instead for careful consideration and more flexible treatment by the people's elected representatives.

ARGUMENT

I. THE CHALLENGED ARTICLE 48 EXCLUSIONS DO NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

Despite the extended discussion of First Amendment principles in their brief, plaintiffs cite no authority to support the central claim they make in this case - that under the Free Speech Clause the government may not restrict the subjects that can be addressed in the popular lawmaking process. This is not surprising "for although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." *Marijuana Policy Project ("MPP") v. United States,* 304 F.3d 82, 85 (D.C.Cir.2 2002). Even Meyer v. Grant, 486 U.S. 414 (1988), upon which plaintiffs rely heavily, addressed only the state's "power to limit *discussion* of political issues raised in initiative petitions" - and not whether restricting the subjects of popular lawmaking implicates the Free Speech Clause. *Id.* at 425. The Article 48 exclusions do not limit discussion of any issue - indeed, they place no restrictions whatsoever on plaintiffs' speech - and, consequently, do not implicate the Free Speech Clause.

A. The Binding Lawmaking Aspect of the Initiative Process Is Not Speech And Thus Is Not Subject to Scrutiny under the Free Speech Clause.

In Massachusetts, an initiative petition is not a mere citizen request for legislative action - which would be protected under the Free Speech Clause - but instead has independent and significant legal force as the first step in an alternative mechanism for amending the state constitution.[10] The Free Speech Clause does not require that if this lawmaking mechanism is made available for constitutional amendments on some subjects, it must be made equally available on all subjects. In *Marijuana Policy Project ("MPP"),* 304 F.3d 82, the Court addressed circumstances strikingly similar to those here in rejecting a challenge under the First Amendment to a subject matter limitation affecting the District of Columbia ballot initiative process. Plaintiff MPP submitted an initiative to the D.C. Board of Elections to allow the medical use of marijuana. The Board refused to certify the initiative, citing the Barr Amendment, by which Congress denied the District of Columbia authority to "enact... any law" reducing penalties associated with possession, use or distribution of marijuana. *Id.* at 83-84.[11] The Court held that this limitation did not violate MPP's rights under the Free Speech Clause, finding "no case... establishing that limits on legislative authority - as opposed to limits on legislative advocacy - violate the First Amendment." *Id.* at 85. *See* id. at 83 ("[T]he legislative act - in contrast to urging or opposing the enactment of legislation - implicates no First Amendment concerns[.]") Although MPP asserted that the Barr Amendment's subject matter limitation proscribed "core political speech," the Court found that the Amendment "restricts

no speech" and that "medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties." *Id.*[12]

Marijuana Policy Project specifically rejected the proposition that the Barr Amendment amounted to unconstitutional "viewpoint" discrimination by "silenc [ing] one side of the medical marijuana debate while allowing the other side full access to the District's ballot initiative process." 304 F.3d at 85-86, quoting MPP Brief. The Court stated that "the Barr Amendment silences no one; it merely shifts the focus of debate between medical marijuana supporters and their opponents from the D.C. legislative process ... to Congress. *Id.* at 86. The same is true in the present case; because the Article 48 exclusions do not "silence" any speech, whether it advances the "pro-aid" side of the debate over private school funding, *see* Pl. Br. at 29, or the contrary position, they do not discriminate based on viewpoint.

Like *Marijuana Policy Project,* other courts have also held that the Free Speech Clause does not grant citizens rights in the lawmaking process itself. In *Skrzypczak v. Kauger,* 92 F.3d 1050 (10th Cir. 1996), *cert. denied.* 519 U.S. 1115 (1997), the Court held that pre-submission review of the content of an initiative petition by the Oklahoma Supreme Court did not amount to prior restraint of the "core political speech" of a person who desired to have the initiative on the state ballot. *Id.* at 1052. The initiative, known as State Question 642, proposed restrictions on abortion that the Oklahoma Supreme Court held would be unconstitutional and could not be on the ballot. *Id.* When the state court's action was later challenged in federal court, the Tenth Circuit held that the plaintiff suffered no harm cognizable under the Free Speech Clause, explaining that:
Skrzypczak mistakenly conflates her legally-protected interest in free speech with her personal desire to have SQ 642 on the ballot. In removing SQ 642 from the ballot, the Oklahoma Supreme Court has not prevented Skrzypczak from speaking on any subject. She is free to argue against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue. Her right to free speech in no way depends on the presence of SQ 642 on the ballot.

Id. at 1053. *See also Save Palisade Fruitlands v. Todd,* 279 F.3d 1204, 1211 (10th Cir. 2002), *cert. den.* 537 U.S. 814 (2002) (rejecting free speech challenge to Colorado law that provides an initiative and referendum process for "home rule" counties but not "statutory" counties; initiative process need not "be granted to all political subdivisions or with respect to all subjects").][13]

There is no question that the process of *circulating* initiative petitions is " 'core political speech,' because it involves 'interactive communication concerning political change.' " *Buckley v. American Constitutional Law Foundation, Inc.,* 525 U.S. 182, 186 (1999), quoting *Meyer v. Grant,* 486 U.S. 414, 422 (1988). But neither of these cases considered the issue here -whether the First Amendment precludes limitations on the subjects that the initiative lawmaking process, itself, may address. In *Meyer* the Court struck down Colorado's prohibition on using paid circulators to collect petition signatures, finding it unduly restrictive of petition proponents' right to engage in political speech. 486 U.S. at 420-28. For similar reasons, *Buckley* struck down Colorado's requirements that initiative petition circulators be registered voters, that they wear identification badges, and that petition proponents report the names, addresses, and amounts paid to petition circulators. 525 U.S. at 197-204. *See also Perez-Guzman v. Gracia,* 346 F.3d 229 (1st Cir. 2003) (holding invalid statute requiring that signatures on petitions seeking to register a new political party be notarized by an attorney).

But the lawmaking process is distinct from speech *associated with* the lawmaking process, such as that considered in *Meyer* and *Buckley.* "[I]n the initiative process people do not seek to make wishes known to government representatives but instead to enact change by bypassing their representatives altogether." *Biddulph v. Mortham,* 89 F.3d 1491, 1497 (11th Cir. 1996). In Massachusetts the initiative "is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection." Amend. Art. 48, Pt. 1. *Meyer* and *Buckley* - dealing as they do with restrictions on petition circulators - "cast no light on the issue before us - whether a legislature can withdraw a subject from the initiative process altogether." *Marijuana Policy Project,* 304 F.3d at 86. *See Skrzypczak,* 92 F.3d at 1053 ("There is nothing in *Meyer* suggesting that there is a protected right to have a particular initiative on the ballot."); *Save Palisade Fruitlands,* 279 F.3d at 1212 (*Meyer* and *Buckley* "do not establish that when the power of initiative is created for one political subdivision, it must necessarily

be created for all political subdivisions."). *Meyer* "established an explicit distinction between a state's power to regulate the initiative process in general and the power to regulate the exchange of ideas about political changes sought through the process. The Court only addressed the constitutionality of the latter." Biddulph, 89 F.3d at 1498 n.7.

Although the Free Speech Clause certainly limits states' power to regulate a citizen's request for government action, it does not grant citizens the right to set a particular lawmaking process in motion. The Article 48 exclusions leave plaintiffs' "core political speech" completely unrestricted - plaintiffs are, for example, free to circulate a petition asking the Legislature to approve a change in the Anti-Aid Amendment and submit the change to the people for ratification. The exclusions do not deprive such a petition of its persuasive effect or of its significance as an expression of popular will. They merely deprive it of legal significance as an operative step in the constitutional amendment process. Because an initiative petition is a part of the lawmaking process, and the Free Speech Clause does not impose constraints on that process, the Clause does not provide the plaintiffs a right to certification of their petition on a subject excluded from that lawmaking process.[14]

B. Even If the Initiative Lawmaking Process Were Subject to a Conventional Free Speech Analysis, the Article 48 Exclusions Would Be Valid as Reasonable, Viewpoint-Neutral Restrictions Occurring in a "Non-public Forum."

Because the Article 48 exclusions do not implicate the Free Speech Clause, this Court should not evaluate them under a conventional free speech analysis. That analysis recognizes three speech fora - the traditional public forum, the designated public forum, and the nonpublic forum - in which varying degrees of judicial scrutiny apply to governmental restrictions on speech. *Cornelius v. NAACP Legal Defense and Ed. Fund,* 473 U.S. 788, 799-802 (1985). The most regulation is tolerated in a nonpublic forum. *Id; accord Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983).

Marijuana Policy Project found "[n]othing in public forum cases, including the limited public forum cases" to support First Amendment scrutiny of a subject matter limitation in the District of Columbia initiative process. 304 F.3d at 86. The Court explained:

The defining characteristic of traditional and limited public fora, such as streets, parks, public school facilities, and student newspapers, is that they are "devoted to assembly and debate" or "opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). Although places designated for the expression of views about legislation -- the grounds of the U.S. Capitol, for example, *Lederman v. United States,* 291 F.3d 36 (D.C. Cir. 2002)- share these characteristics, the legislative act itself, i.e., the voting that occurs inside the Capitol, does not. The same is true for the ballot initiative process: That process certainly stimulates First Amendment-protected debate and discussion, but no case holds that the act of voting in a ballot initiative - a legislative act - is itself a public forum.

304 F.3d at 86-87. *See also Locke v. Davey,* 124 S.Ct. 1307, 1324 n.3 (2004) (finding state scholarship program is not a "forum for speech" and rejecting Free Speech claim against program's exclusion of aid to devotional theology study). Because this analysis applies with equal force to the Massachusetts initiative process, neither the Anti-Aid exclusion nor the religious-institutions exclusion is subject to a conventional, free speech forum analysis.

Even assuming *arguendo* that a conventional forum analysis applied here, the Article 48 exclusions would operate in, at most, a nonpublic forum.[15] Restrictions on speech that occurs in a nonpublic forum are permissible so long as they "are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius,* 473 U.S. at 800. The Anti-Aid and religious institutions exclusions are reasonable[16] and plainly viewpoint neutral. They exclude efforts to expand as well as eliminate the prohibitions of the Anti-Aid Amendment, and they exclude any proposed law related to religious institutions, regardless of whether it seeks to benefit or disfavor such institutions. *See Berner v. Delahanty,* 129 F.3d 20, 28 (1st Cir. 1997) (viewpoint discrimination occurs when state "picks[s] and choose[s] among similarly situated speakers in order to advance or suppress a particular ideology or outlook" but not when it restricts "an entire category of speech based on its content") (citations omitted).[17]

Thus, even if viewed under a conventional free speech analysis, the Anti-Aid and religious institutions exclusions would be nonetheless valid. The initiative lawmaking process could be no more than a nonpublic forum and the exclusions are valid because they are reasonable and viewpoint-neutral. The many free speech cases cited by the plaintiffs (Pl. Br. at 21-31) would be inapplicable even under a forum analysis because they either involved public fora, viewpoint discrimination, or ballot-question campaigns where restrictions on circulation of petitions (not restrictions on the permissible subjects of the lawmaking process) were found unreasonable. Accordingly, the district court properly held that the challenged exclusions doe not violate plaintiffs' rights under the Free Speech Clause of the First Amendment.

II. THE RELIGIOUS INSTITUTIONS EXCLUSION DOES NOT BURDEN RELIGIOUS BELIEFS, STATUS, OR CONDUCT, AND THUS DOES NOT VIOLATE THE FREE EXERCISE CLAUSE.

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." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993). The religious institutions exclusion plainly does not offend these proscriptions.[18] The exclusion is neutral on its face and does not "suppress religious belief or practice," as prohibited by the Free Exercise Clause. *Id.* at 523. Rather, laws relating to "religion, religious practices or religious institutions" are simply placed completely off-limits to popular lawmaking, leaving such measures for full consideration in the legislative process. The exclusion applies equally to measures proposed by any group or individual, regardless of their religious affiliation or lack thereof. There is no discrimination based on what sort of impact, positive or negative, the excluded lawmaking might have on religion, or based on whether the persons seeking to engage in such lawmaking are (or are perceived as) acting out of religious beliefs or for religious ends.[19] Given the neutrality of the exclusion, plaintiffs are wrong to contend that it shows "an official purpose to *disapprove* of a particular religion" or even "religion in general," which phrases are sometimes used to evaluate whether government action violates the Establishment Clause. Pl. Br. at 42, quoting *Lukumi,* 508 U.S. at 532 (emphasis added). As the district court concluded, the religious institutions exclusion "is neutral on its face, and appears to protect free exercise of religion, rather than infringe it." *See* Order denying prel. injunction, dated May 5, 2000, at 3.[20]

The plaintiffs' Free Exercise claim must fail because the religious institutions exclusion does not, in any respect, burden plaintiffs' religious beliefs, conduct or status. "[T]he free exercise inquiry [asks] 'whether government has placed a substantial burden on the observation of a *central belief or practice.' " Strout v. Albanese,* 178 F.3d 57, 65 (1st Cir. 1999), quoting *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989) (emphasis in opinion). Just this Term the Supreme Court held that the State of Washington did not violate the Free Exercise Clause by excluding the pursuit of a devotional theology degree from an otherwise inclusive scholarship aid program. *Locke v. Davey,* 124 S.Ct. at 1312-13. *Davey* found it dispositive that the challenged provision "imposes neither criminal nor civil sanctions on any type of religious service or rite[,] does not deny to ministers the right to participate in the political affairs of the community ... [a]nd it does not require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 1312-13 (citations omitted). The *Davey* Court discerned no Free Exercise violation where Washington "ha[d] merely chosen not to fund a distinct category of instruction." *Id.*[21]

Similarly, in this case the plaintiffs do not identify any religious belief they hold, or any religious practice in which they engage, that is burdened by the challenged exclusion.[22] This omission is fatal to their Free Exercise claim. *See e.g. Lukumi,* 508 U.S. at 534 (ordinances prohibiting the ritual slaughter of animals violated the Free Exercise Clause because "suppression of the central element of the Santeria worship service was the object of the ordinances."). Plaintiffs do not claim that their religious beliefs or practices require them to seek the enactment of laws or constitutional amendments that Article 48 excludes from the initiative process. *Cf. e.g. Hobbie v. Unemployment Appeals Comm'n,* 480 U.S. 136, 138-9, 146 (1987) (holding unconstitutional the denial of unemployment benefits to a Seventh Day Adventist fired for refusing to work on Saturday in violation of her religious faith). And plaintiffs are certainly not engaged in "religious conduct" simply because they desire to amend the Anti-Aid Amendment to permit state financial assistance for religious education. *See Strout,* 178 F.3d at 65 (rejecting Free Exercise challenge to Maine's refusal to provide direct subsidies to parochial schools because desire to attend a parochial school is not

a Roman Catholic "belief" and "no [plaintiff] parent makes the claim that attendance at a religious schools is a central tenet or practice of their faith"); *cf. Gary S. v. Manchester School Dist.,* No. 03-1211 (1st Cir. 2004) (decided July 1, 2004) (no cognizable burden on religion caused by federal government's failure to provide benefits to disabled children attending Catholic schools that are provided to disabled public school children).

Plaintiffs cannot rest their Free Exercise claim on *McDaniel v. Paty,* 435 U.S. 618 (1978), which invalidated a Tennessee law disqualifying ministers from serving as constitutional convention delegates. The *McDaniel* plurality concluded that the disqualification, which conditioned the minister's right to serve as a delegate on his giving up his ministry, did not directly burden his religious beliefs, but did directly burden his religious "status, acts and conduct," *id.* at 626-27, and was not necessitated by the countervailing state interest in avoiding the establishment of religion. *Id.* at 628-29.[23] Nothing in *McDaniel* stands for the proposition that a state must allow its citizens to engage in direct popular lawmaking related to religious institutions. *McDaniel* simply calls for strict scrutiny of laws that directly burden religious status or conduct. As explained above, the religious-institutions exclusion has no such effect; it is not limited to clergy or other religious persons, as was the Tennessee law in *McDaniel,* but applies to any measure that relates to religious institutions, regardless of its sponsor or the measure's effect. Consequently, the exclusion does not, as plaintiffs claim, deny persons access to the initiative process "on the basis of religion," Pl. Br. at 45, and, accordingly, does not run afoul of *McDaniel.*[24]

III. THE ARTICLE 48 EXCLUSIONS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Plaintiffs cannot succeed on their equal protection challenges to either the Anti-Aid exclusion or the religious-institutions exclusion, because neither exclusion discriminates based on a suspect classification or burdens any fundamental right. Therefore, each exclusion need only be supported by a rational basis, which is readily apparent here. *See generally Romer v. Evans,* 517 U.S. 620, 631 (1996) (in equal protection cases, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end"). In addition, where, as here, the challenged law does not violate the Free Exercise Clause, a separate claim against the law under the Equal Protection Clause based on allegations of religious discrimination is subject only to rational-basis scrutiny. *Davey,* 124 S.Ct. at 1312, n.3, citing *Johnson v. Robinson,* 415 U.S. 361, 375 n.14 (1974). *See also Strout,* 178 F.3d at 67 (Campbell, J., concurring).

Moreover, the plaintiffs' burden is especially steep as they make only a facial challenge to the Anti-Aid and religious-institutions exclusions, which are plainly neutral on their face. The plaintiffs do not argue, nor could they, that the Attorney General certifies petitions that disfavor religious interests, and rejects others.[25] The plaintiffs thus "carry a significantly heavier burden [in this facial challenge] than one who seeks merely to sidetrack a particular application of the law." *McGuire v. Reilly,* 260 F.3d 36, 46-47 (1st Cir. 2001). As explained below, the plaintiffs have failed to meet their burden.

A. The Article 48 Exclusions Do Not Discriminate Against Religion or Religious Persons or Institutions, Either Facially or in Operation.

Both of the challenged Article 48 exclusions apply equally to measures proposed by any group or individual, regardless of their religious affiliation or lack thereof. The Anti-Aid exclusion bars use of the initiative process to change any aspect of the Anti-Aid Amendment, whether related to religion or not, and thus does not classify based on religion.[26] Similarly, the religious-institutions exclusion is neutral on its face and evenhandedly bars initiatives that would disfavor religion as well as those that might benefit religion. Consequently, it does not discriminate based on religion.

Plaintiffs' equal protection attack on the Article 48 exclusions is based largely on two cases, both of which are easily distinguishable because they involved laws effectively imposing - indeed, specifically intended to impose - a disadvantage on a particular minority group, by restructuring the political process *solely* to make it more difficult to enact laws or implement

policies to protect that group. *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457 (1982); *Hunter v. Erickson,* 393 U.S. 385, 393 (1969). The Anti-Aid exclusion and religious-institutions exclusion do no such thing, for the reasons discussed below.

In *Hunter,* the Court struck down a city charter amendment requiring that any city council ordinance dealing with housing discrimination based on race, religion, or ancestry be submitted to the voters for approval before becoming effective. 393 U.S. at 385. Although the charter amendment "on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Id.* at 391. The charter amendment was thus "an explicitly racial classification," id. at 389, that "places special burdens on racial minorities within the governmental process." *Id.* at 391. The amendment "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).

Likewise, in *Washington,* the Court struck down a state initiative law that was intended solely to bar local school boards from busing students to achieve racial desegregation. 458 U.S. at 457. "[D]espite its facial neutrality there is little doubt the initiative was drawn for racial purposes ..... [T]he text of the initiative was carefully tailored to interfere only with desegregative busing." *Id.* at 471. By imposing state-law restrictions on local action, the initiative "burden[ed] all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government," the state. *Id.* at 483. Because "desegregation of the public schools ... at bottom inures primarily to the benefit of the minority, and is designed for that purpose," id. at 472, " 'the reality is that the law's impact falls on the minority.' " *Id.* at 475 (quoting *Hunter,* 393 U.S. at 391). In short, the initiative law was a *de facto* racial classification that "use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities." *Id.* at 470.

Anti-Aid Exclusion. In contrast to the laws in *Hunter* and *Washington,* the Anti-Aid exclusion does not burden any particular group of citizens, religious or otherwise. Rather, it evenhandedly places beyond the reach of the initiative each 'and every part of the Anti-Aid Amendment - including its explicit guarantee of free exercise of religion (amend. art. 46, § 1); its prohibition on aid to private schools, hospitals and institutions that are *not* religious as well as those that are religious (id. § 2); and its guarantee that private institutions of all sorts (without mention of their religious character *vel non*) may still be compensated for providing care to the indigent sick, deaf, dumb and blind (id. § 3). By excluding the Anti-Aid Amendment from the initiative process - and leaving it to be amended only when proposed by the Legislature - Article 48 safeguards the Anti-Aid Amendment's provisions that protect religion, and those that have nothing to do with religion, as well as those that forbid aid to religious institutions.[27]

It is evident that the Anti-Aid exclusion does not impose a special burden solely on those who seek public funding for religious schools. As the district court observed: "[T]he Anti-Aid Amendment does not identify a single group ... but] restricts public funding to a range of potential recipients, including not only private religious primary and secondary schools but also [other non-public institutions]." A. 54 (Mem. and Order (February 12, 2001) at 4, n. 3). Not surprisingly, the plaintiffs do not even contend that the Anti-Aid exclusion classifies or discriminates on the basis of religion. Rather, plaintiffs acknowledge that the exclusion "erects a barrier" for *all* persons who seek public funding *for private* schools - which are, of course, both religious and non-religious. Pl. Br. at 56. *See* A. 699-700, 754-755 (Collins Aff., ¶¶ 3, 5; Faria Aff. ¶ 3, Exs. A and B (54% of Massachusetts private schools have a religious affiliation)).

Because plaintiffs cannot show that the Anti-Aid exclusion burdens a suspect class, their claims must fail under *James v. Valtierra,* 402 U.S. 137 (1971). In *James,* the Court rejected an equal protection challenge to a provision in the California Constitution that prohibited development by the state of low-rent public housing unless approved in a community-wide referendum. *Id.* at 140-43. The Court found no denial of equal protection because the referendum requirement did not implicate race or other suspect classifications, even though it clearly "disadvantaged" the group that sought publicly funded housing. *Id.* at 141-42 (declining to extend the rule in Hunter).[28] The plaintiffs in the present case also seek public funding - for private schools rather than low-income housing - and claim that the legislative process is more burdensome for them than for groups

that do not desire such funding. Plaintiffs cannot, however, identify any suspect class that is specially harmed and consequently fail under *James* to show a constitutional violation. Cf. *Walker v. Exeter Region Coop. School Dist.,* 284 F.3d 42, 46-47 (1st Cir. 2002) (rejecting equal protection challenge to New Hampshire scheme under which bond issues in some schools districts are approved by a simple majority of elected officials and in other districts require direct approval by a "super-majority" of voters).

Plaintiffs hint - but plainly do not prove - that the Anti-Aid exclusion burdens religious persons disproportionately by asserting that the majority of private schools are religious schools. Pl. Br. at 56. Regardless of whether the evidence supports plaintiffs' assertion, there is no violation of the Equal Protection Clause.[29] In *Valeria v. Davis,* 307 F.3d 1036 (9th Cir. 2002), the Court rejected the proposition that "political restructuring violates equal protection anytime it affects a program that inures primarily to the benefit of racial minorities." *Id.* at 1042. *Valeria* affirmed the dismissal of an equal protection challenge to California's Proposition 227, which replaces bilingual education programs with a program designed to teach students in English and can only be amended "upon approval by the electorate" or by a statute passed by a two-thirds majority of each house of the state legislature and signed by the Governor. *Id.* at 1038. The Court held that "[t]he mere fact... that California's [limited English proficient] student population is predominantly Hispanic/Latino, and that proponents of Proposition 227 specifically identified this racial group during the initiative's campaign, does not itself suffice to create a colorable equal protection political structure claim[]" under *Hunter* and *Washington. Id.* at 1042.

Religious-Institutions Exclusion. The plaintiffs fare no better in their challenge to the religious-institutions exclusion. Because the exclusion prohibits proposed initiative measures that would disadvantage religious institutions *and* those that would benefit such institutions it does not, as plaintiffs argue, create a classification limited to religious persons. Plainly, the exclusion applies to persons that propose initiatives that would harm religious interests. The religious exclusion thus does not create any classification that is cognizable under an equal protection analysis and plainly does not create a "suspect" classification, as plaintiffs argue. *Cf. Crawford v. Board of Education.,* 458 U.S. 527, 538 (1982) (distinguishing "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters").[30]

B. The Article 48 exclusions do not impose "special burdens" on religion, religious persons, or religious institutions.

Unlike in *Washington* and *Hunter,* where the government singled out particular anti-discrimination laws and required that *only* those laws be enacted through a specially burdensome process, Article 48 excludes a broad range of subject matters from the popular lawmaking process. All of these exclusions were critically important limits on the initiative process from its inception. In addition to the religious-institutions and Anti-Aid exclusions, the drafters and the people declared that an initiative petition could not propose any measure that relates to the judiciary or the courts, that is restricted in its operation to a particular city or town, or that makes a specific appropriation of money from the state treasury. Art. 48, Init., pt. 2, § 2, ¶ 1. Also excluded were any measures inconsistent with ten enumerated individual rights protected by the Commonwealth's Declaration of Rights. *Id.* ¶ 3. *E.g., Bowe v. Secretary of the Commonwealth,* 320 Mass. 230, 247-53, 69 N.E.2d 115, 127-31 (1946) (barring initiative from the ballot that, if approved by the people, would violate state constitutional guarantees of free speech, free press, and free assembly). Finally, the Article 48 exclusions were themselves excluded from the initiative process, to place these protections against unwise popular lawmaking beyond the direct reach of the people. Art. 48, Init., pt. 2, §2, 4.

It is evident that the Article 48 exclusions - when viewed as a whole - bar initiatives that might be favored by a broad range of interest groups. Thus it cannot be said that the Anti-Aid exclusion or the religious-institutions exclusions impose any impose any *" 'special* burdens on ... minorities within the governmental process.' " *Washington,* 458 U.S. at 470 (emphasis in original; citation to *Hunter* omitted). In rejecting the equal protection claim in *James,* the Court found it significant that "persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle." 402 U.S. at 142 (noting other California laws that can only be enacted or repealed by a referendum). Nor have the plaintiffs here been "singled out" under Article 48, standing as they do in the same position as the diverse array of interests that may favor initiatives on other excluded subjects. For this additional reason, the Anti-Aid exclusion and the religious exclusion do not violate equal protection.

Contrary to plaintiffs' claim, *Hunter* did not remotely suggest that a state violates equal protection if its "political process [places] a special burden in the way of enacting laws dealing with race or religion[.]" Pl. Br. at 51. *Hunter* was not concerned with broad subject matters; rather, it invalidated a provision that disfavored particular laws protecting against racial, religious, and ancestral discrimination by making the enactment of such protective laws more difficult.[31] Nothing in *Hunter* suggests that excluding from the popular lawmaking process all laws that address a religious subject is invalid, or even subject to heightened scrutiny, especially where the usual legislative processes remain fully available. As shown above, *Washington* is to the same effect. The religious-institutions exclusion creates no such special burdens.[32]

C. The Challenged Article 48 Exclusions are Rationally Related to Legitimate Governmental Purposes.

For the reasons explained above, the Anti-Aid exclusion and the religious-institutions exclusion do not discriminate against a suspect class or burden a fundamental right. As such, the exclusions are "presumed to valid and will be sustained if the classification drawn by [Article 48] is rationally related to a legitimate state interest." *City of Cleburne,* 473 U.S. at 439. This test they easily pass. In their brief, the plaintiffs do not seriously contend that these exclusions fail rational basis review. *See Walker,* 284 F.3d at 47 (discussing the "lenient" rational basis test). Rather, plaintiffs argue only that the exclusions do not survive strict scrutiny, a standard that is not applicable here.

The Anti-Aid exclusion is rationally related to several legitimate governmental interests. It protects the delicate financial and religious compromise embodied in the Anti-Amendment (amend. art 46, § 2) from being too easily overturned by direct popular action, which might open the public treasury to the demands of private institutions (Whether religious or not).[33] It protects from direct popular action the Anti-Aid Amendment's state constitutional guarantee of free exercise of religion (id. § 1).[34] And it protects from direct popular action the provisos that the Anti-Aid Amendment does not prohibit payment of public funds to private institutions (whether religious or not) for the care of the indigent sick, deaf, dumb and blind (id. § 3), and does not deprive any inmate "of the opportunity of religious exercises of his own faith." *Id.* § 4.

Finally, the exclusion helps ensure that any change to the Anti-Aid Amendment is submitted to the voters only after the Legislature both (1) gives full consideration to all interests involved in such a complex topic and (2) has an opportunity to incorporate those considerations into the actual language of the proposed change. An amendment proposed by initiative petition must be voted upon in the exact form in which it was introduced, which is the form in which it was drafted by the ten voters who submitted it to the Attorney General at the outset of the process. Amend. art. 48, Init., pt. 4, § 3. Any changes require a 75% vote in a joint legislative session. *Id.* Thus it is very difficult to change the language of an initiative amendment to accommodate competing considerations and interests. An amendment proposed by a legislator, in contrast, may be amended by simple majority vote, making it more likely that a legislative amendment reflects the complexity of an issue and the views of competing interest groups. Given an issue as complex as the Anti-Aid Amendment, which required 180 pages of debate in 1917 (*see* 1 *Debates* at pp. 50-230), the flexibility to make even minor adjustments in language can be critical. It is rational to exclude the Anti-Aid Amendment from the initiative process, which lacks such flexibility.

The religious-institutions exclusion is rationally related to at least two legitimate governmental interests. First, it prevents the initiative process from being used to make laws that, while perhaps politically popular, might treat particular religious institutions, or such institutions generally, in a manner that violates the state or federal Free Exercise or anti-Establishment guarantees. This is one of the same purposes behind Article 48's exclusion of any measure inconsistent with various enumerated state constitutional rights. *See* Article 48, Init., pt. 2, § 2, ¶ 3. It is certainly rational to prevent the initiative process from being used to enact legislation that will later be declared unconstitutional; it saves the resources of the state electoral and judicial machinery and protects the public from being asked to take a vote that may well prove meaningless.[35]

Second, and independently, the religious-institutions exclusion rationally serves a legitimate governmental interest in preventing direct popular lawmaking on potentially controversial and divisive issues, reserving such lawmaking instead for more careful

consideration and more flexible treatment by the people's elected representatives. As discussed above, although a state is severely constrained in the degree to which it may regulate popular *debate* of divisive issues, a state need not, in creating an initiative process, open up that machinery to direct popular *lawmaking* on divisive issues. It is rational to conclude that such popular lawmaking may inflame religious passions, exacerbate religious divisions, and lead to ill-considered and unwise laws, even if those laws might be constitutional.[36] Surely the people of Massachusetts have a legitimate interest in avoiding such injuries to the body politic. Plaintiffs' equal protection claims therefore must fail.

D. The Plaintiffs' Unsubstantiated Claim That the Anti-Aid Amendment Is Applied in a Manner That Favors the Interests of Private Cbaritable Institutions Over Those of Private Schools Is Irrelevant to the Question of Whether the Article 48 Exclusions Violate the Equal Protection Clause.

In apparent recognition that the Article 48 exclusions do not, themselves, violate the Equal Protection Clause, the plaintiffs nonetheless contend that the Anti-Aid exclusion should be struck down because, plaintiffs say, the separate Anti-Aid *amendment* is itself "discriminatorily applied." Pl. Br. at 56, 59-60. Plaintiffs argue that persons seeking funding for private schools are disadvantaged because other "private charitable institutions" receive public funds in Massachusetts in violation of the Anti-Aid Amendment. *Id.* For the reasons below, this claim is irrelevant to the question of whether the Anti-Aid exclusion violates equal protection and provides no basis for relief in this case.

First, *as the* district court ruled, the plaintiffs lack standing to challenge the Anti-Aid Amendment. A. 51-57 (Order dated February 12, 2001 dismissing plaintiffs' constitutional claims against Anti-Aid Amendment). Nonetheless, plaintiffs attempt to assert what amounts to an "as-applied" claim against the Anti-Aid Amendment in the context of their challenge to Article 48's Anti-Aid exclusion. Pl. Brief at 56, 59-60. The plaintiffs may not obtain adjudication of a claim that has been dismissed.

Second, the plaintiffs' as-applied claim against the Anti-Aid Amendment does nothing to establish that the Anti-Aid *exclusion* violates equal protection, either on its face or as applied. Plaintiffs do not argue - nor could they - that the *exclusion* has been applied in a discriminatory way (for example, by attempting to prove the Attorney General has certified other initiative petitions seeking to amend the Anti-Aid Amendment, while rejecting the plaintiffs' petition). Thus, the contentions plaintiffs make about how the Anti-Aid *amendment* has been implemented are simply irrelevant to their claim that Article 48, in excluding certain subjects from the initiative process, violates equal protection.

Third, plaintiffs have not, in any event, shown that the Anti-Aid Amendment has been applied in violation of the Equal Protection Clause. On its face, their argument does no more than draw a distinction between public funding of private schools and public funding related to "other private charitable institutions." Pl. Brief at 56.[37] As such, plaintiffs cannot show discrimination based on *religion* or any suspect classification. *See James,* 402 U.S. at 141-42. Plaintiffs' suggestion that if private schools, as a class, are disadvantaged under the Anti-Aid Amendment, the Commonwealth has discriminated against *religious* interests simply will not wash, even if the majority of private schools are religious. *See Valeria,* 307 F.3d at 1042, discussed above.

Moreover, even if plaintiffs had standing and could prove unlawful discriminatory application of the Anti-Aid Amendment, the proper relief would be a prospective injunction forbidding specific instances of improper funding. *Cf. Steffel v. Thompson,* 415 U.S. 452, 474 (1974) (in an as applied challenge, remedy will be a "declaration specifying a limited number of impermissible applications of the statute"). Plaintiffs would not be entitled to a declaration that the Anti-Aid Amendment itself is invalid. *Cf. United States v. Christian Echoes National Ministry. Inc.,* 404 U.S. 561, 564 (1972) (per curiam) (district court holding that IRS *may* not discriminate in enforcement *of statute "does not call into question* the validity" of the underlying statute). *A fortiori,* plaintiffs would not be entitled to the relief they seek here - a declaration that the Anti-Aid *exclusion* is unconstitutional on its face.[38]

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Footnotes

1 In this appeal, the plaintiffs do *not* challenge the dismissal of their claims against the Anti-Aid Amendment.

2 In Massachusetts, there are 661 private schools serving elementary and secondary school age children, 357 of which (or 54%) have a religious affiliation. A. 699-700, 754-755 (Collins Aff., ¶¶ 3, 5; Faria Aff. ¶ 3, Exs. A and B).

3 Of the twenty-three other states that have statewide initiative processes, eleven have subject matter restrictions. *See* Council of State Gov'ts 32 Book of the States at 211 (1998).

4 The Anti-Aid Amendment was approved by the voters on November 6, 1917, by a margin of 61% to 39%. 1 *Debates in the Massachusetts Constitutional Convention, 1917-1918* at 230 (1919) (hereafter *Debates).*

5 The proposal to broaden the original Anti-Aid Amendment to preclude aid to *any* institution (whether religious or not) that was not under public control was made to the 1917-1918 Constitutional Convention by Rep. Martin Lomasney of Boston, a prominent Catholic politician. A. 638-41 (Def. Stmt. of Material Facts under Local Rule 56.1). This position represented a compromise intended to place on equal footing both parochial schools (which were already ineligible for state-funds)-and-the private "academies" often attended by Protestants (which had been receiving public funds). A. 63 8. One prominent historian has noted that this compromise was supported by "[a] wide majority of the [constitutional] convention, including all but nine of the ninety-four Catholic delegates." A. 641. *See* l *Debates* at 199 (remarks of Mr. Coleman, noting that Anti-Aid Amendment was supported by Mr. Curtis, "a rock-ribbed Republican...of the Protestant faith" and by Mr. Lomasney, "a red-hot Democrat" and "a devout Catholic"; "yet they are joining heart and hand in their advocacy of this measure, upon which one might suppose they never would be able to agree").

6 The purpose of the exclusion, now appearing in amend. art. 48, Init., pt. 2, § 2, and Ref., pt. 3, § 2, was to keep from the statewide ballot matters that were not of statewide concern. 2 *Debates* at 693, 703; *Ash v. Att'y Genl,* 418 Mass. 344, 348, 636 N.E.2d 229, 231-32 (1994).

7 This concept was later extended to the initiative in what became amend. art. 48, Init., pt. 2, § 2. The purpose of this-exclusion was "to preserve the Legislature's general authority over the State treasury, and to preclude special interest groups from attempting to usurp that authority through the use of initiatives which might compel the expenditure of public funds in a piecemeal fashion." *Associated Industries of Massachusetts v. Secretary of the* Commonwealth, 413 Mass. 1, 6-7, 595 N.E.2d 282, 285 (1992).

8 *See* 2 Debates at 734-39; the language now appears in amend. art. 48, Init., pt. 2 § 2, ¶ 4.

9 For example, it was proposed to exclude from the initiative matters related to judges, judicial decisions, and courts, on the theory that the Massachusetts judiciary functioned well and should not be subject to direct popular oversight. *Id.* at 789 (remarks of Mr. Cummings). This exclusion, too, was ultimately adopted.

10 Indeed, a constitutional amendment under the initiative process may proceed even if 75% of two successive Legislatures has voted the proposal down on roll-call votes. *See* p. 9, above.

11 With respect to the District of Columbia, Congress exercises "all police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Marijuana Policy Project,* 304 F.3d at 83, quoting *Palmore v. United States,* 411 U.S. 389, 397 (1973).

12 The *MPP* Court also concluded that *Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001), upon which plaintiffs in the present case rely, "has nothing to do with this case" because of its "unique concern with a 'serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.' " *Marijuana Policy Project,* 304 F.3d at 87, quoting *Velazquez,* 531 U.S. at 544. *Velazquez* addressed restrictions on private speech - not restrictions on a legislative process - that limited what indigent litigants could argue in court (through their federally funded attorneys). *Id.* at 543 (referring to "LSC's regulation of private expression").

13 In addition, cases considering First Amendment challenges to state election procedures are consistent with the view that regulation of the binding lawmaking aspect of the initiative petition process does not implicate the Free Speech Clause. *See Timmons v. Twin Cities*

Area New Party, 520 U.S. 351, 363 (1997) (rejecting arguments "that [plaintiff] has a right to use the ballot... to send a particularized message" or that "[b]allots serve ... as forums for political expression"); *Burdick v. Takushi, Director of Elections of Hawaii,* 504 U.S. 428, 438 (1992) (declining to "[a]ttribut[e] *to elections* a ... generalized expressive function").

14 If plaintiffs were correct in asserting that the Free Speech Clause invalidates the Anti-Aid and religious institutions exclusions, a serious question would be raised whether those provisions are, under state law, severable from the remainder of Article 48's initiative provisions, or instead whether the *entire* initiative process must be invalidated. Cf. *MassPIRG v. Secretary of the Commonwealth,* 375 Mass. 85, 91-92, 375 N.E.2d 1175, 1179-80 (1978) (Article 48's county-distribution signature rule was not severable from remainder of initiative provisions, so that if county distribution rule were invalid, entire initiative process was invalid, and "plaintiffs would have no right to place an initiative proposal on the ballot of this or any other State election unless a new constitutional amendment were adopted").

15 Since the moment of its creation, the initiative process has not been "generally open to the public;" rather, it has been strictly closed to lawmaking in a number of broadly defined subject areas, including not only the Anti-Aid Amendment and religious institutions but also measures related to specific cities and towns; measures related to the judiciary, measures making specific appropriations from the state treasury; and measures inconsistent with certain rights enumerated in the Massachusetts Declaration of Rights. Amend. art. 48, Init., pt. 2, § 2. *See Cornelius,* 473 U.S. at 803-06 (historical determination by government to limit access to Combined Federal Campaign (CFC) charity drive supports conclusion that CFC was not created as a forum for expressive activity and was, at most, a nonpublic forum).

16 See discussion below at pages 50-54.

17 *Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819 (1995), strongly supports the conclusion that the challenged exclusions are viewpoint neutral. There the University refused to pay the cost of printing petitioners' student publication "for the sole reason that their student paper 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.' " *Id.* at 822-23. The University's action amounted to viewpoint discrimination because "[b]y the very terms of the prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. Because the "prohibited perspective, [and] not the general subject matter, resulted in the refusal to make third-party payments" for the paper's printing costs, the Court found a First Amendment violation *Id.*

18 The plaintiffs do not challenge the Anti-Aid exclusion under the Free Exercise Clause. Pl. Br. at 41-49.

19 For example, Massachusetts' $20,000 cap on the tort liability of charitable institutions, Mass. G.L. c. 231, § 85K, has at times been the subject of controversy, prompting proposals that it be increased or abolished. *See, e.g.,* Wendy L. Pfaffenbach, *The Massachusetts Charitable Immunity Cap: Is it Time for It to Go?,* Mass. Lawyers Wkly, April 10, 2000 (28 M.L.W. 1971). Any initiative petition proposing to raise or abolish the cap in a manner that treated religious charitable institutions *less* favorably than other charitable institutions (perhaps on the misguided theory that a particular religion's charitable institutions were wealthy and could afford a higher cap) would be barred by Article 48's religious-institutions exclusion, just as would an initiative proposal to treat religious charitable institutions *more* favorably.

20 The plaintiffs' quotations from the Constitutional Convention debates do not show an intent to discriminate against religion, or to burden religious beliefs or practice, but simply display the view that religious issues are better addressed by the legislature than in the popular lawmaking process. Pl. Br. at 14. The debates "reveal a clear intent to prevent 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, 556 N.E.2d 348, 354 (1990) (emphasis added). *See id.* at 845, 556 N.E.2d at 352 (quoting remarks of Mr. Curtis expressing the view "that all religious subjects would be handled better by considering them before the Legislature than ... [by] making them the subject of a general discussion by the people at large.").

21 Even though the scholarship program in *Davey* explicitly discriminated against those pursuing a devotional theology degree, the Court found no Free Exercise violation. Thus, Davey illustrates that even a law that is not facially neutral toward religion will not violate the Free Exercise Clause if it does not burden religious practice, beliefs or status. *Davey,* 124 S.Ct. at 1312-13. *See also Lukumi,* 508 U.S. at 533 (a law is "not neutral" under a Free Exercise analysis if its object is "to infringe upon or restrict practices because of their religious motivation"). Although the plaintiffs repeatedly assert - incorrectly - that the challenged exclusion is not "neutral" with

respect to religion, these assertions are inadequate to support a Free Exercise claim where plaintiff have *not identified* any burden that the exclusion places on their religious beliefs or practice.

22 The plaintiffs are not members of a discrete religious group. Of the three plaintiff families, the Boyettes are Pentecostal; the Wirzburgers are Roman Catholic; and the Zubrickis state that they believe in the importance of Catholic teachings but do not claim to be Catholic. A. 28-30 (Amended Complaint, ¶¶ 3-5).

23 Two separate concurrences concluded that the disqualification, whether viewed as burdening the minister's religious acts or his religious beliefs, was absolutely forbidden by the Free Exercise Clause, without regard to the strength of any countervailing state interest. *Id.* at 634-35 (Brennan, J., concurring); 642-43 (Stewart, J. concurring).

24 Nor can plaintiffs support their Free Exercise claim by asserting that the challenged exclusion restricts "religious expression" in "political discourse." Pl. Br. at 48. As explained in Section I, above, the Article 48 exclusions do not restrict speech or expression in any respect, but simply operate as a limitation on the permissible subjects of lawmaking by citizen initiative.

25 The plaintiffs *do* purport to challenge the Anti-Aid *amendment* as "discriminatorily applied;" but that argument is irrelevant to the claim against the Anti-Aid exclusion that they raise in this appeal and, in any event, without merit. *See* pp. 54-56, below.

26 Indeed, the plaintiffs do not even argue that the Anti-Aid exclusion discriminates on the basis of religion or any suspect classification. Plaintiffs urge only that the exclusion erects a "barrier" for those seeking to change the Anti-Aid Amendment to allow Massachusetts' private schools (including those that are religious) to receive public funds. Pl. Br. at 56. *See* Arg. Section III.D, below.

27 *Compare Bagley v. Raymond School Dep't,* 728 A.2d 127, 136-38 (Me. 1999) (state law private non-religious schools but denying aid to religious schools embodied a religious classification and so was subject to strict scrutiny), *cert. denied,* 528 U.S. 947 (1999).

28 *James* described the Pandora's box that would open were it to hold otherwise: "[P]resumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze government structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." *James,* 402 U.S. at 142.

29 Submissions in the district court from the Massachusetts Department of Education indicated that there are 661 private schools in Massachusetts serving elementary and secondary school age children, 357 of which (or 54%) have a religious affiliation. A. 699-700, 754-755 (Collins Aff., ¶ ¶ 3, 5; Faria Aff. ¶ 3, Exs. A and B.) Even if, as plaintiffs suggest, the proportion of religious schools or students is somewhat higher than this, *see* Pl. Br. at 56, n.24, the equal protection analysis is the same.

30 To establish an equal protection violation, plaintiffs would need to show both that the challenged exclusions have a "disproportionate" negative impact on on a suspect class and that the Commonwealth has acted with a "discriminatory intent or purpose" toward the class. *See Hunter v. Underwood,* 471 U.S. 222, 227-228 (1985). Because plaintiffs have not shown that the challenged exclusions discriminate against a suspect class, their equal protection claims were properly rejected in the district court without consideration of plaintiffs' argument that the Massachusetts Constitutional Convention of 1917-1918 was motivated by anti-religious animus. In any event, plaintiffs plainly have not proved this claim through their highly selective quotations from the record of the Constitutional Convention.

31 Plaintiffs themselves identify this critical distinction, noting that the laws challenged in *Hunter* and *Washington* erected "discriminatory barriers" with respect to "discrete subject-matters," while the religious institutions exclusion applies to laws "dealing with religion on *any* subject." Pl. Br. at 54 (emphasis in original).

32 For the reasons explained above, *Romer v. Evans,* 517 U.S. 620 (1996), also has no application to this case. In Romer, the Court struck down a Colorado constitutional amendment that explicitly barred the state and local governments from adopting or enforcing any law or policy prohibiting discrimination based on sexual orientation. *Id.* at 624. The amendment did not forbid *all* laws and policies "relating" to sexual orientation discrimination; it did not ban laws or policies furthering such discrimination, but instead explicitly barred *only* those laws prohibiting such discrimination. *Id.* at 624, 626-27. "The amendment withdraws from homosexuals, but no others, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 627.

33 This interest plainly provides a rational basis for the Anti-Aid exclusion. In *Gordon v. Lance,* 403 U.S. 1 (1971), the Court rejected an equal protection challenge to state constitutional and statutory requirements that certain bond issues and tax increases be approved by 60% of the voters. The Court ruled that, absent discrimination against any identifiable class, it was for the state and its people, not the courts applying the Fourteenth Amendment, to decide which issues were sufficiently important to warrant their removal from simple majority control. *Id.* at 6-7. The Court accepted as a valid basis for the 60% vote requirement the state's decision that these issues were of significant financial importance. *Id.*

34 The state free exercise guarantee was significant in 1918, because it was not until 1940 that the federal Free Exercise Clause was made applicable to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut,* 310 U.S. 293, 303 (1940). It remains significant today, because the Supreme Judicial Court has declared that in interpreting the Anti-Aid Amendment's free exercise clause, it need not be bound by the Supreme Court's interpretation of the cognate federal clause. *Attorney General v. Desilets,* 418 Mass. 316 321-22, 636 N.E.2d 233, 235-36 (1994). *See Abdul-Alazim v. Supt., Mass. Correctional Inst.,* 56 Mass. App. Ct. 449, 778 N.E.2d 946, 950 (2002).

35 That the religious-institutions exclusion may also bar initiatives on laws that would not violate Free Exercise or anti-Establishment guarantees does not make it irrational. Over-inclusivity is constitutionally permissible for laws subject to rational basis review.

36 *See* William E. Adams, Jr., *Pre-Election Anti-Gay Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy,* 55 Ohio St. L.J. 583, 593-98, 604-06, 609 & nn. 126, 127 (1994) (discussing dangers of ballot initiatives, particularly on emotionally volatile issues, including religion, and issues affecting individual rights); Emily Calhoun, Governing *by Initiative: Initiative Petition Reforms and the First Amendment,* 66 U. Colo. L. Rev. 129, 131-32 (1995) (same).

37 Specifically, plaintiffs argue that the Commonwealth "freely fund[s] private religious and non-religious institutions except in the school context," allegedly contrary to the Anti-Aid Amendment. Pl. Br. at 60.

38 Finally, although the entire argument is irrelevant to their challenge to the Anti-Aid exclusion, plaintiffs have not shown that the Commonwealth provides funding to private institutions in violation of the Anti-Aid Amendment. The Anti-Aid Amendment *does not categorically* prohibit payment of public money to private entities. Indeed, if it did so the Commonwealth could not purchase the goods and services it needs to operate. In relevant part, the Anti-Aid primary or secondary school, or charitable or religious undertaking" which is not publicly owned and under exclusive public control. Art, 46, § 2 (emphasis added). Plaintiffs identify essentially two types of payments of public funds to private entities: (i) the purchase of services by the Commonwealth, usually where a private contractor provides some type of governmental service, such as shelter for homeless persons or services to veterans, A. 69-71 (Gaubatz Aff., ¶¶ 2, 3, 7, 8; and Exs. A, B, C and Table 1), and (ii) *payments to private entities* to accomplish a specific public purpose, such as funding by the Massachusetts Historical Commission to rehabilitate historically significant structures (many of which are churches). A. 70-71 (Gaubatz Aff., ¶¶ 5, 6). Both arrangements are entirely consistent with the Anti-Aid Amendment. *See Commonwealth v. School Committee of Springfield,* 382 Mass. 665, 417 N.E. 2d 408 (1981) (upholding disbursement of state funds to private school providing special education services for children whose special needs could not be met in public schools); *Helmes v. Commonwealth,* 406 Mass. 873, 550 N.E. 2d 872 (1990) (upholding payment of state funds to a private charitable organization for the purpose of rehabilitating the battleship U.S.S. Massachusetts as a war memorial).

THE COMMONWEALTH OF MASSACHUSETTS
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September 6, 2017

Shawn Cooper
90 Medford Street #648
Boston, MA 02129

RE: Initiative Petition No. 17-15, Proposed Land Reform Law

Dear Mr. Cooper:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August of this year. I regret that we are unable to certify that the proposed law is in "proper form for submission to the people," as required by Article 48, the Initiative, Part 2, Section 3. Our decision, as with all decisions on certification of initiative petitions, is based solely on art. 48's legal standards; it does not reflect any policy views the Attorney General may have on the merits of the proposed law.

An initiative petition that does not propose either a law or a constitutional amendment is not in proper form for certification by the Attorney General. See Amend. Art. 48, The Initiative, Part II, Section 1 ("An initiative petition shall set forth the full text of the constitutional amendment or law . . . which is proposed by the petition."); Paisner v. Attorney General, 390 Mass. 593, 598-599 (1983) (to be in proper form for submission to the voters, initiative under Article 48 must propose either a constitutional amendment or a law).[1] For purposes of Article 48, the Massachusetts Supreme Judicial Court has described a law "as including a measure with binding effect, or as importing 'a general rule of conduct with appropriate means for its enforcement by some authority possessing sovereign power over the subject; it implies command and not entreaty.'" Mazzone v. Attorney General, 432 Mass. 515, 530 (2000) (citing Opinion of the Justices to the House of Representatives, 262 Mass. 604, 605 (1928)).

In this case, Petition 17-15 proposes a policy to allow individuals to buy "buildable (city owned) vacant land parcels for an affordable fair market value." The petition does not include any mechanism for its enactment or enforcement. It is not possible to discern from the text whether an administering entity would be created, whether enforcement would be placed with an already existing entity, or what, if any, consequences or penalties would flow from a violation of

[1] Initiative Petition 17-15 does not suggest a constitutional amendment. Therefore, the only relevant inquiry is whether it proposes a law.

the proposed law. With no means of implementation or enforcement, the petition does not state a law and cannot be certified.

In addition, pursuant to Article 48, the Attorney General must prepare a "fair and concise summary" of the proposed petition which aims to ensure that "the voters understand the law upon which they are voting." Bowe v. Sec'y of the Commonwealth, 320 Mass. 230, 241 (1946). Many of the terms used in Petition 17-15 are ambiguous, making it impossible to draft a fair and concise summary as required by Article 48. For instance, the terms "small buildable" and "affordable fair market value" are not defined in the petition and are susceptible to multiple interpretations. These terms lack specificity that would allow the Attorney General to fairly and concisely inform the voter as to the meaning of the proposed law.

In light of the fact that Petition 17-15 contains no means of implementation or enforcement and uses ambiguous terms that impair our ability to prepare a fair and concise summary of the proposed law, Petition 17-15 is not in "proper form for submission to the people" and cannot be certified.

Very truly yours,

Juliana deHaan Rice
Deputy Chief
Government Bureau

cc: William Francis Galvin, Secretary of the Commonwealth

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September 6, 2017

Carl Tripp
14R Friend Street
Hingham, MA 02043

Re: Initiative Petition No. 17-28, An Act Shall Minimize Out-of-Pocket Expenses for Holistic Healthcare for Massachusetts Citizens

Dear Mr. Tripp:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August of this year. I regret that we are unable to certify that the proposed law is in "proper form for submission to the people," as required by Article 48, the Initiative, Part 2, Section 3. Our decision, as with all decisions on certification of initiative petitions, is based solely on Article 48's legal standards; it does not reflect any policy views the Attorney General may have on the merits of the proposed law.

We understand that the proposed law would require health insurance providers to cover holistic health care services for Massachusetts residents. Such coverage would include treatment performed or prescribed by a licensed holistic practitioner. The proposed law would establish a committee to determine reimbursement rates and a licensing board for holistic practitioners. It also sets forth licensing and fee requirements, as well as penalties for violations of the law.

However, the proposed law contains several ambiguous provisions that make it impossible for us to determine—and inform potential voters of—the meaning and important effects of the proposed law. Therefore, as explained in more detail below, we are unable to certify the petition in accordance with Article 48.

A. The Proposed Law is Not in Proper Form for Submission to the People

The proposed law is not in "proper form for submission to the people" as required by Article 48. The "proper form" requirement was originally designed primarily to avoid "errors of draftsmanship." Nigro v. Attorney General, 402 Mass. 438, 446 (1988). As stated by one of the framers of Article 48, "the object is this: That we shall have a responsible officer … to certify

that there are no mistakes." Id. (quoting 2 Debates in the Massachusetts Constitutional Convention, 1917-18, the Initiative and Referendum at 724 (1918) (comments of Mr. Churchill)). The Attorney General's review, however, extends beyond a "narrow and technical" reading of the "proper form" requirement. See Paisner v. Attorney General, 390 Mass. 593, 598 (1983).

Particularly after Article 48 was amended in 1944 to emphasize the "[e]conomy of language and fairness" in the Attorney General's summary of a proposed law, the understanding of what constitutes "proper form" has expanded. Mass. Teachers Ass'n v. Sec'y of Commonwealth, 384 Mass. 209, 227 (1981). Now, the "proper form" requirement, read together with the amended Article 48 requirement that the Attorney General prepare a "fair, concise summary" of the law, aims "to inform both potential signers and voters of the contents of the proposed law." Nigro, 402 Mass. at 447. Thus, it is generally understood that a law is not in "proper form" when it is not susceptible to preparation of a comprehensible summary.

With respect to Initiative Petition 17-28, the proposed law contains highly ambiguous provisions that make it impossible to determine, and inform potential voters of, its meaning and effect in a comprehensible summary. These unresolvable ambiguities derive from undefined terms and phrases, internally conflicting provisions, poor sentence construction, and unexplained redundancies. Examples of the most serious of these obscurities follow.

One of the proposed law's most obvious ambiguities is its undefined "electronic access" mechanism, which appears in multiple sections. Section 2 provides that a "Licensed Holistic Practitioner shall provide access to coverage for a patient or client through an electronic access, to the" Insurance Providers. Section 3(d) provides that "[e]lectronic access shall be established between the (DTA) office and/or an insurance company and/or Any health/medical insurance company in the Commonwealth of Massachusetts, or any company doing business as a health/medical insurance company in the Commonwealth of Massachusetts and the Licensed Holistic Practitioner's office." Section 4 provides that the Licensed Holistic Practitioner shall have electronic access only if the Department of Transitional Assistance and the Licensed Holistic Practitioner are located in the same county.

The proposed law, however, does not define "electronic access." It is unclear whether electronic access means access to insurance information held by the insurers, access to medical information held by the Licensed Holistic Practitioner (or another provider), electronic access to funds, the possibility of treatment being effectuated electronically (such as over Skype), or some other access. Moreover, the multiple references to "electronic access" are contradictory in their respective suggestions of the electronic access' primary beneficiary. Section 2 suggests that the electronic access will be for the patient's benefit, as the patient would be provided access to coverage through electronic access to the insurance providers. But Section 4 seems to suggest that the electronic access is for the Licensed Holistic Practitioner's benefit, as electronic access would be withheld from Licensed Holistic Practitioners not located in the same county as the Department of Transitional Assistance. Without any definition or further explanation of electronic access, it is impossible to determine what the meaning and effect of the electronic

access would be.[1]

There is also a conflict between Section 5 and Section 6. Section 5 provides that the Governor and the Insurance Providers "shall prosecute and potentially" issue fines for violations of the proposed law.[2] Section 6, however, grants the Governor and the Attorney General "exclusive authority to enforce the provisions" of the proposed law. The proposed law does not resolve the conflict between these two provisions, and voters would be left asking who has the authority to enforce this law.

Section 1 contains another example of an uninterpretable ambiguity. Section 1(b) provides the following sentence: "It shall be required and extend coverage by insurers; to include health/medical insurance companies, the Commonwealth of Massachusetts Department of Transitional Assistance, Any health/medical insurance company in the Commonwealth of Massachusetts, or any company doing business as a health/medical insurance company in the Commonwealth of Massachusetts must provide coverage to Massachusetts citizens for consultations/visits, treatments, and prescribed therapies provided by Licensed Holistic Practitioners." The construction of this sentence does not allow for interpretation. In the context of the proposed law's purpose to mandate coverage of holistic health care treatment, this provision may have been intended to mandate such coverage by the identified entities. Section 3, however, provides that some or all of the same insurance providers would fund coverage and grant benefits to the patient. In light of Section 3, it would be impossible for a voter to understand what is meant by Section 1(b). What is being required? Who is it being required of? How are these requirements different from the requirements of Section 3?

There are numerous other ambiguities and undefined terms throughout this proposed law. What is the difference between mandated "coverage" in Section 3(a) and mandated "benefits" in Section 3(b)? Is a "Holistic Health Practitioner" different from a "Holistic Practitioner" (Section 8)? How many Massachusetts State Boards are there (Section 8: "Each Massachusetts State Board shall have . . .")? What would a "written log" contain (Section 3(c))? What is the "misuse of any applications" (Section 5)? What is a "Portfolio Review" (Section 8)? There are still other ambiguities not detailed here.

Taken together, the undefined terms, internal conflicts, inconsistencies, and other drafting errors make it impossible to determine with certainty what the provisions of the proposed law accomplish as written. Accordingly, the proposed law does not appear to be in "proper form," as the Attorney General cannot inform the voters, through a "fair, concise summary," what they are being asked to support.

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[1] We now understand that "electronic access" was intended to refer to the EBT/debit card funding mechanism referenced in Section 3(c). This intention, however, is not evident on the face of the petition, which is what the Attorney General must summarize.

[2] To the extent that the Petition provides for criminal prosecution, the ambiguities throughout portend additional constitutional infirmities. "It is a central tenet of our constitutional law that, as a matter of due process, a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden should be deemed void for vagueness." Opinion of the Justices to House of Representatives, 378 Mass. 822, 826 (1979).

B. Additional Potential Certification Issue

We note that the proposed law may also be inconsistent with the "right to receive compensation for private property appropriated to public use" and therefore may contain an excluded matter that would bar certification pursuant to Article 48. This concern arises from the material changes the proposed law would make to pre-existing insurance contracts between health insurers and their subscribers, namely, the addition of mandated holistic health care benefits to such contracts. Absent compensation to insurance providers for the imposition of these new contractual obligations and by negating such providers' right to exclude holistic health care benefits in their insurance contracts, the proposed law may constitute the taking of a party's contract right, which Massachusetts has recognized as the taking of property within the meaning of the takings clause. Dimino v. Sec'y of Commonwealth, 427 Mass. 704, 708-710 (1998). In light of the Petition's other problems with "proper form" discussed above, we do not decide the takings issue, but merely raise it for your consideration in the event you resubmit your petition in the future.

* * *

For the foregoing reasons, we are unable to certify Initiative Petition 17-28 as meeting the requirements of Article 48.

Very truly yours,

Juliana deHaan Rice
Deputy Chief, Government Bureau
617-963-2583

cc: William Francis Galvin, Secretary of the Commonwealth