

No. 26-97

IN THE
Supreme Court of the United States

ARIELLA HELLMAN, ET AL.,

Petitioners,

v.

KATHERINE CRAVEN, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals for the
First Circuit**

**BRIEF OF *AMICUS CURIAE* PROFESSOR
CHARLES L. GLENN IN SUPPORT OF
PETITIONERS**

MATT GREGORY
Counsel of Record
JOHN W. TIENKEN
JASON H. BAE
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8500
mgregory@gibsondunn.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Does the unconstitutional conditions doctrine apply to the right, recognized in *Pierce v. Society of Sisters*, to send one's child to a private school?

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INTEREST OF *AMICUS CURIAE*¹

Amicus Professor Charles L. Glenn is a professor emeritus of educational leadership and policy at Boston University. He is the author of over 300 articles and book chapters and over a dozen books, including *The Myth of the Common School* and *The American Model of State and School*. Members of this Court have cited his work in prior opinions. *E.g.*, *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 499–500 (2020) (Alito, J., concurring); *Roper v. Simmons*, 543 U.S. 551, 625 (2005) (Scalia, J., dissenting). Prior to his career in academia, Professor Glenn spent twenty years as the director of urban education and equity efforts for the Massachusetts Department of Education, where he spearheaded the desegregation of Boston Public Schools and administered millions of dollars each year in more than a dozen cities to provide for “magnet schools,” public schools with distinctive educational missions designed to attract voluntary attendance and promote racial desegregation. As a historian who also served for decades in public education, Professor Glenn is particularly well acquainted with this country’s history of funding schools and Massachusetts’ restrictions—both at present and historically—on public support for private education. Professor Glenn has an interest in the sound development of the body of law relating to parents’ fundamental right to choose the education of their children.

¹ Pursuant to this Court’s Rule 37.2, all parties have received timely notice of *amicus*’s intent to file this brief. Pursuant to this Court’s Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief’s preparation or submission. No person other than *amicus* or his counsel made a monetary contribution to the brief’s preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the application of the Anti-Aid Amendment² of the Massachusetts Constitution, which conditions the availability of special-education services on parents’ giving up their right to send their children to private school. The Anti-Aid Amendment provides that “[n]o ... public money ... shall be [appropriated] ... for the purpose of ... aiding any ... primary or secondary school ... which is not publicly owned.”³

The Anti-Aid Amendment’s seemingly neutral text obscures its bigoted origins as a measure designed to obstruct Catholic immigrants from educating their children at Catholic private schools. It is an “uncomfortable past,” but one that this Court should “examine[].” *Ramos v. Louisiana*, 590 U.S. 83, 100 n.44 (2020).

Massachusetts first ratified the Anti-Aid Amendment when the Commonwealth was swept by a tide of anti-Catholic bigotry. The Know Nothing Party—formed to decrease the political influence of immigrants and Catholics—took the reins of the Commonwealth’s government in 1854 and began a program of anti-Catholic legislation. The Know Nothings targeted the new arrivals’ political participation by enacting, among other things, a literacy test. And the Know Nothings targeted education specifically as the growing Catholic immigrant community opened Catholic private schools.

As originally ratified, the Anti-Aid Amendment provided that “moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools.”⁴ As this Court has recognized, “sect”

² Mass. Const. amend. XVIII (1855), *amended by* Mass. Const. amend. XLVI, § 2 (1917) and Mass. Const. amend. CIII (1974).

³ *Id.*

⁴ Mass. Const. amend. XVIII (1855).

was understood to be an explicit reference to Catholicism and thus Catholic schools. *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000). With the Anti-Aid Amendment, the Know Nothings ensured that no public funding would reach Catholic schools—even if the new immigrants gained more political power. And the Amendment meant Massachusetts could direct its support to “common schools” that inculcated government-approved (and commonly Protestant) values. In this way, the government could use common schools to mold Catholic immigrant children into the image of the then-Protestant majority. Despite this “shameful pedigree,” the Anti-Aid Amendment would inspire similar constitutional amendments in 36 other states, as well as the failed federal Blaine Amendment.⁵ *Mitchell*, 530 U.S. at 828; *Espinoza*, 591 U.S. at 482.

Massachusetts revised the Anti-Aid Amendment as part of its 1917 constitutional convention. The revisions extended the Amendment’s reach to ban public support of *all private* schools, not just Catholic schools. These changes came in response to another wave of immigration, including from predominantly Catholic countries, in the early twentieth century. Amid debates over the future scope of the Amendment, many non-Catholics in Massachusetts were willing to sacrifice state aid to other private institutions as the price of ensuring a permanent bar on aid to parochial schools in the revised Amendment. The revision also advanced a worldview that the government, not parents or private societies, should guide children’s future. The popular mood of the time rejected the notion that schools could legitimately offer varied perspectives on the nature of a flourishing life, responsive to the concerns of parents. Instead, as one delegate to the 1917 constitutional convention put it, the belief was that education should solely be based

⁵ Cornelius Chapman, *The Know-Nothing Amendments: Barriers to School Choice in Massachusetts* 9 (Pioneer Inst. 2009).

upon “principles ... laid down by public officers and public agents.”⁶

At the same time as its ratification, other state governments, too, responded to increased immigration with similar efforts. For example, states sought to impose government-mandated curricula and to compel public schooling. In two cases arising from laws enacted in this same era and reflective of the same beliefs, this Court addressed state efforts to compel government-directed education. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), Nebraska’s 1919 Siman Law, which prohibited the instruction of students in certain foreign languages, was held unconstitutional. *Id.* at 400–01. In *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), the Court found Oregon’s Compulsory Education Act, which required public school attendance, also unconstitutional. *Id.* at 534–35. A “child is not the mere creature of the state”; instead a child’s parents “have the right, coupled with the high duty, to recognize and prepare” him or her for the future. *Id.* at 535.

The Anti-Aid Amendment is cut from the same cloth as the laws this Court addressed in *Pierce* and *Meyer*. In those cases, this Court vindicated the right of parents to choose the schooling consistent with their hopes for their children. To the extent the Anti-Aid Amendment likewise places impermissible conditions on that right, it is unconstitutional.

⁶ 1 Debates in the Massachusetts Constitutional Convention 1917–1918, at 157–58 (1919) [*hereinafter* 1917 Debates].

ARGUMENT

I. THE MASSACHUSETTS ANTI-AID AMENDMENT REFLECTS ANTI-CATHOLIC BIGOTRY.

A. The Know Nothings Take The Reins Of Massachusetts' Government.

In the “second half of the 19th century,” more than 30 states adopted no-aid provisions in their state constitutions. *Espinoza*, 591 U.S. at 482. These provisions “prohibit[ed] States from aiding ‘sectarian’ schools.” *Id.* As this Court has recognized, “it was an open secret that ‘sectarian’ was code for ‘Catholic.’” *Mitchell*, 530 U.S. at 828. These amendments—along with a proposal to similarly restrict federal support known as the Blaine Amendment—were “born of bigotry” and “arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.” *Id.* at 828–29. Massachusetts’ Anti-Aid Amendment led the Nation in this “checkered tradition.” *Espinoza*, 591 U.S. at 482.

Massachusetts originally adopted its Anti-Aid Amendment in 1855. The year prior, the Know Nothing Party—“in many ways a forerunner of the Ku Klux Klan”—took the reins of state government and “championed one of the first constitutional bans on aid” to Catholic schools. *Espinoza*, 591 U.S. at 505 (Alito, J., concurring). The Know Nothing Party had been formed to “decrease the political influence of immigrants and Catholics.” *Id.* at 499. Its power and popularity grew as a direct reaction to the significant increase in the Catholic population in Massachusetts and across the country during the mid-nineteenth century.

Roughly five million European immigrants reached the shores of the United States between 1815

and 1865.⁷ No group defined this wave more than Catholic Irish immigrants. From 1820 to 1860, about one-third of the immigrant population was Irish; in the 1840s, that proportion approached half of all immigrants.⁸ Most of these immigrants settled in port cities on the East Coast, including Boston, where the Irish population grew rapidly.⁹ “Between 1830 and 1850 the Irish population of Boston swelled to approximately 35,000 out of 137,000.”¹⁰ By 1860, nearly half of all children born in Massachusetts had foreign-born parents.¹¹

Some viewed these newcomers with distrust, doubting whether Catholicism could be reconciled with republican self-government.¹² For example, some thought that there was a fundamental “inconsistency between what the Catholics desire and the whole genius and nature of our political institutions.”¹³ An 1832 encyclical issued by Pope Gregory XVI, which condemned the separation of church and state, seemed to confirm the worst suspicions of those who characterized Catholicism as a threat to liberty.¹⁴ Others simply demeaned Catholics as “soldiers of the Church of Rome,” who ‘would attempt to

⁷ Oscar Handlin, *Boston's Immigrants, 1790–1880: A Study in Acculturation* 30 (Harvard Univ. Press 1941); see generally Immigration Comm’n, Reports of the Immigration Commission (U.S. Gov’t Print. Off. 1911).

⁸ Chapman, *supra* note 5, at 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Charles F. Folsom, *Observations on the Births, Marriages, and Deaths in Massachusetts in 1879: Prepared for the Thirty-Eighth Massachusetts Registration Report* 22 (1880).

¹² See Charles L. Glenn, *The American Model of State and School: An Historical Inquiry* 156 (Bloomsbury 2012).

¹³ Samuel T. Spear, *Religion and the State: or, The Bible and the Public Schools* 36 (New York, Dodd, Mead & Co. 1876).

¹⁴ Glenn, *supra* note 12, at 106.

subvert representative government.” *Espinoza*, 591 U.S. at 499 (Alito, J., concurring).

In 1854, during this wave of anti-Catholic immigrant fervor, the Know Nothings swept into power in Massachusetts. All 40 state senators were Know Nothings.¹⁵ And so were all but three of 379 state representatives.¹⁶ The voters elected a strongly anti-Catholic governor—Henry Gardner.¹⁷ Tellingly, in his inaugural address, Governor Gardner warned that “[t]he most prominent subject before our State and Nation at the present moment ... concerns our foreign population[;] the duties of republicanism towards them, its dangers from them.”¹⁸

The Know Nothings took aim at the new arrivals’ political participation by enacting a literacy test and extending residency requirements for voting. They proposed barring voting until a foreign-born individual had lived in Massachusetts for 21 years. And the Know Nothings even sought to ban Catholics from holding office in Massachusetts.¹⁹

B. The Know Nothings Target Catholic Schools.

The Anti-Aid Amendment emerged from the Know Nothings’ policies on education. As originally ratified, the Anti-Aid Amendment provided that “moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own

¹⁵ *Id.* at 111.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Henry J. Gardner, *Inaugural Address, in Acts and Resolves Passed by the General Court of Massachusetts in the Year 1855* 978 (Boston, William White 1855).

¹⁹ Chapman, *supra* note 5, at 5; see also Thomas H. O’Connor, *The Boston Irish: A Political History* 75–80 (Northeastern Univ. Press 1995).

schools.”²⁰ As this Court has recognized, “sect” was understood to be an explicit reference to Catholicism and thus Catholic schools. *Mitchell*, 530 U.S. at 828.

In enacting the Anti-Aid Amendment, the Know Nothings advanced two goals. First, the Amendment ensured that no public funding would support Catholic schools. By constitutionalizing the prohibition on supporting Catholic schools, the Know Nothings ensured that “some new sect may [not] outvote the Protestants, and claim the school fund” in subsequent years.²¹ Second, the Amendment would mean the Commonwealth could direct its support to “common schools” that inculcated government-approved values. In fact, proponents of the Anti-Aid Amendment advocated for the common-school model as a means to mold Catholic immigrant children into the image of the then-Protestant majority.

The Anti-Aid Amendment was a direct response to the growing number of private Catholic schools. In 1829, Catholic families started to organize their own schools in the Commonwealth, and those schools rapidly grew in number and size.²² Although there were no more than 500 students in Catholic schools in 1829, the number grew to 4,100 in Boston by 1845.²³ The growth of Catholic families also raised the possibility that Catholics would seek public funding for their schools in the Commonwealth, as had already occurred in New York and Philadelphia.²⁴

²⁰ Mass. Const. amend. XVIII (1855).

²¹ *Official Report of the Debates and Proceedings in the State Convention: Assembled May 4, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts* 615 (Boston, White & Potter 1853) (statement of Del. B. F. Hallett) [*hereinafter* 1853 Debates].

²² Chapman, *supra* note 5, at 5–6.

²³ Handlin, *supra* note 7, at 173.

²⁴ Chapman, *supra* note 5, at 6.

Some viewed the very existence of Catholic schools as a fundamental threat. A series of newspaper articles argued that “Popery is the natural enemy of *general* education.... If it is establishing schools, it is to make them *prisons* of the youthful intellect of the country.” *Espinoza*, 591 U.S. at 499–500 (Alito, J., concurring) (emphasis in original). An article reprinted in the *Common School Journal* warned that leaving education in the hands of Catholic immigrants would be to foster “a system of dividing children into sectarian schools for the avowed purpose of teaching them sectarian peculiarities, ... a system well fitted to drive the children of ... Roman Catholics, into clans by themselves, where ignorance and prejudice respecting the native population, and a spirit remote from the American ... will be fostered in them.”²⁵

The common-school proponents aspired to use a single, state-defined model of education to instill uniform civic and religious values into the children of immigrants. As Horace Mann, the first secretary of the State Board of Education, remarked, “a foreign people, born and bred and dwarfed under the despotisms of the Old World, cannot be transformed into the full stature of American citizens merely by a voyage across the Atlantic,” and “[i]f [immigrants] retain the servility in which they have been trained, some self-appointed lord or priest on this side of the water will succeed to the authority of the master whom they have left behind them.”²⁶ The common school, in Mann’s view, would be the product of strong paternalistic governments “that assumed responsibility for the

²⁵ *The Proposed Substitution of Sectarian for Public Schools*, 10 *Common Sch. J.* 145, 169 (1848).

²⁶ Horace Mann, *Ninth Annual Report of the Secretary of the Board of Education* (1845), in 4 *Life and Works of Horace Mann* 1, 37 (George C. Mann ed., 1891).

intellectual, moral, and physical welfare of their citizens.”²⁷ The supporters of the Anti-Aid Amendment shared this view, and made no effort to hide their hopes that, through the common school, “Catholics will become Protestants through the influence of these [common] schools.”²⁸

Perhaps the most influential Protestant advocate for the education of immigrant children in common schools was Horace Bushnell. In 1853, he argued that immigrants, who had been given all the privileges of a free society, were ungratefully insisting “that [the state] must excuse them and their children from being wholly and properly American.”²⁹ Bushnell warned that Catholic clergy were “preparing for an assault upon the common school system,” and that in Catholic schools, the children of immigrants would be “instructed mainly into the foreign prejudices and superstitions of their fathers, and the state, which proposes to be clear of all sectarian affinities in religion, will pay the bills[.]”³⁰ It was his hope that, through the common public school, the “multitudes” “may be gradually melted into one homogeneous people.”³¹

Governor Gardner echoed this sentiment in his support for the Anti-Aid Amendment, remarking that “[e]very additional naturalization [of immigrants] tends to denationalize, to Europeanize, America.” The native-born people of Massachusetts, Gardner asserted, should “distrust foreign influences nursed in

²⁷ Daniel Walker Howe, *Making the American Self: Jonathan Edwards to Abraham Lincoln* 160–61 (Harvard Univ. Press 1997).

²⁸ 1853 Debates, *supra* note 21, at 622 (statement of Del. George S. Ball).

²⁹ Mary Bushnell Cheney, *Life and Letters of Horace Bushnell* 299 (New York, Harper & Brothers 1880).

³⁰ Horace Bushnell, *Building Eras in Religion* 72, 85 (Charles Scriber’s Sons 1881).

³¹ *Id.* at 103.

customs and creeds antagonistical to republicanism”; he added that “[t]he dominant race must regulate the incoming class.”³²

Accordingly, common-school advocates urged that immigrant children be brought “under the full action of our common schools,” so that the schools might introduce “the social and religious principles of New England.”³³ The object, as common-school advocates put it, was “a national assimilation”—the “making them one in character and in spirit”—lest the population “become a congeries of clans, congregating without coalescing.”³⁴

But neither the leading lights of the common-school movement nor the proponents of the Anti-Aid Amendment sought to remove all religion from public education. To the contrary, nearly all schools had a religious character in this era.³⁵ And the common schools themselves were undisputedly and deeply religious. In his inaugural address, Governor Gardner made clear that he sought “to retain the Bible in our common schools”—just not the Catholic Bible.³⁶ Common schools required daily reading of the King James Bible and Protestant prayers, taught from the New Testament, and had mandatory attendance six days

³² Gardner, *supra* note 18, at 979, 981–82.

³³ Lyman Beecher, *Plea for the West* 63 (Leavitt, Lord & Co. 2d ed. 1835); Kathryn Kish Sklar, *Catharine Beecher: A Study in American Domesticity* 116 (Yale Univ. Press 1973).

³⁴ C. E. Stowe, *The Education of Emigrants*, in *Transactions of the Fifth Annual Meeting of the Western Literary Institute and College of Professional Teachers* 61, 68–69 (Cincinnati 1836); *The Proposed Substitution*, *supra* note 25, at 168.

³⁵ See Glenn, *supra* note 12, at 56–74; see also Brief for Prof. Charles L. Glenn as Amicus Curiae Supporting Petitioners, *Carson v. Makin*, 596 U.S. 767 (2022) (No. 20-1088).

³⁶ Gardner, *supra* note 18, at 980.

of the week, making it difficult for Jewish students to observe their Sabbath.³⁷

The text of the Anti-Aid Amendment explicitly accounted for the Know Nothings' preference for the common school's religious practices over those in Catholic schools. The Anti-Aid Amendment confined public support to schools "conducted according to law, under the order and superintendence of the authorities of the town or city," and forbade any appropriation "to any religious sect for the maintenance exclusively of its own schools."³⁸ The reference to schools "conducted according to law" covered local common schools that taught a Protestantism broad enough to be shared by both Orthodox and Unitarian Congregationalists.³⁹ And, as discussed, the phrase "religious sect" was reserved for the schools of the Catholic minority, *see Mitchell*, 530 U.S. at 828, ensuring that common schools remained eligible for public support despite explicit Protestant-focused education.⁴⁰

After the Know Nothing legislature adopted the Anti-Aid Amendment, Massachusetts voters approved and ratified it on May 23, 1855. It went into effect on October 1, 1855, and was among the earliest measures of its kind. Despite its "shameful pedigree," the Anti-Aid Amendment inspired similar amendments to the constitutions of 36 other states over the next six decades, as well as the failed federal Blaine Amendment.⁴¹ *Mitchell*, 530 U.S. at 828; *Espinoza*, 591 U.S. at 482.

³⁷ See Chapman, *supra* note 5, at 6; Handlin, *supra* note 7, at 173.

³⁸ Mass. Const. amend. XVIII (1855).

³⁹ Chapman, *supra* note 5, at 9.

⁴⁰ Glenn, *supra* note 12, at 165.

⁴¹ Chapman, *supra* note 5, at 9.

II. SUBSEQUENT MODIFICATIONS TO THE ANTI-AID AMENDMENT ONLY INCREASED THE NUMBER OF PARENTS INJURED BY IT.

Today, the text of the Massachusetts Anti-Aid Amendment no longer refers to “sects.” Instead, it applies to all private schools, whether religious or not. Even so, it remains “tethered to its original bias.” *Espinoza*, 591 U.S. at 507 (Alito, J., concurring) (internal quotation marks omitted). And, even as modified, it remains a relic from an era that sought to deny parents their fundamental right to direct their children’s education, whether religious or otherwise.

The most significant change to the Anti-Aid Amendment emerged from the 1917 Massachusetts Constitutional Convention. One of the foremost issues at the Convention was the future of the Anti-Aid Amendment. As the *New York Times* remarked at the time, “[t]he so-called ‘sectarian’ or ‘non-sectarian’ amendment, directed in reality against the Catholic Church, [was] a fine bit of political bigotry” that the delegates would be addressing.⁴² Yet the solution the delegates ultimately approved *extended*, rather than stamped out, the Commonwealth’s antipathy toward parents who sought to decide for themselves how to educate their children.

By the time of the 1917 convention, Irish Catholics had firmly established themselves in Massachusetts politics. For example, Massachusetts elected its first Irish Catholic governor in 1914. Yet the Commonwealth faced a new influx of Catholic immigrants from other countries. Between 1900 and 1910, more than 150,000 Italians, 80,000 Poles, and 25,000 Lithuanians arrived.⁴³ As in the 1850s, some groups responded with efforts to limit immigration to Protestant populations. “A widespread hysterical taking of stock began. Immigration, formerly more than

⁴² *Bay State Constitution Patchers*, N.Y. Times (June 7, 1917).

⁴³ Chapman, *supra* note 5, at 6–7.

welcomed as an economic boon, was now scrutinized as a eugenic menace.”⁴⁴

Likewise, in the early twentieth century some looked to government-directed education as the answer to the perceived problems presented by new immigrants. Ellwood P. Cubberley, a prominent professor of education (and eugenicist), argued in his influential book *Changing Conceptions of Education* (1909) that “these southern and eastern Europeans are of a very different type from the north Europeans who preceded them.”⁴⁵ Not only were they, in Cubberley’s view, “[i]lliterate, docile, lacking in self-reliance and initiative,” they also gave no allegiance to the “Anglo-Teutonic” ideas of law, order, and government.⁴⁶ Cubberley called for a campaign “to break up these groups,” and “to implant in their children, so far as can be done, the Anglo-Saxon conception of righteousness, law and order, and popular government, and to awaken in them a reverence for our democratic institutions and for those things in our national life which we as a people hold to be of abiding worth.”⁴⁷ This effort to “assimilate and amalgamate” would be accomplished, in part, by compulsory education in government-operated schools.⁴⁸

Cubberley was just one voice in a chorus of “administrative progressives” who sought to centralize education in government-run schools. For example, a report to the National Council of Education in 1891 had “called for stronger compulsory education laws to get children of immigrants into public schools and ‘educated as American citizens in the language, history,

⁴⁴ Horace M. Kallen, *Culture and Democracy in the United States* 24 (Boni & Liveright 1924).

⁴⁵ Ellwood P. Cubberley, *Changing Conceptions of Education* 15 (Houghton Mifflin 1909).

⁴⁶ *Id.*

⁴⁷ *Id.* at 15–16.

⁴⁸ *Id.* at 15.

traditions, and governmental principles of their adopted country.”⁴⁹

Against this backdrop, the 1917 Massachusetts Convention also occurred in the midst of years of debate over the scope of the Anti-Aid Amendment. The state legislature had considered a constitutional amendment every year since 1900 to expand the Anti-Aid Amendment to cover “*any* institution, school, society or undertaking which is wholly or in part under sectarian or ecclesiastical control.”⁵⁰ Heightening the concerns of proponents seeking to expand the Anti-Aid Amendment, the Supreme Judicial Court of Massachusetts in 1913 held that the Amendment was limited to elementary and secondary schools. *In re Opinion of the Justices*, 214 Mass. 599, 601, 102 N.E. 464, 465 (1913). Accordingly, “there [was] no constitutional prohibition against appropriations for higher educational institutions, societies or undertakings under sectarian or ecclesiastical control.” *Id.* To nativist elements in Massachusetts, this decision opened the door to support for Catholic institutions and raised the prospect that the growing Catholic population could one day obtain political support to assist parochial schools. By the time of the Convention, the popular mood was decidedly against private education.

The debates over the 1917 Anti-Aid Amendment rested on a fundamental disagreement about the nature of American society: whether it could rest upon a pluralism of communities negotiating their differences with mutual respect, or whether it required that divergent communities be conformed to a single pattern of beliefs and habits through the instrument of public schooling. Some Catholic delegates insisted

⁴⁹ Jeffrey E. Mirel, *Patriotic Pluralism: Americanization Education and European Immigrants* 13 (Harvard Univ. Press 2010).

⁵⁰ John P. Whittaker, *The Impact of the State Constitutional Convention of 1917 on State Aid to Higher Education in Massachusetts*, 7 New Eng. J. Pub. Pol’y 39, 45–46 (1991) (emphasis added).

that their schools were “educating their children to become good citizens,” and that “the prejudice of this day against parish schools” was “unjust and oppressive.”⁵¹ “We are legislating,” one participant observed, “in mutual fear and distrust.”⁵² But as another delegate insisted, “no money [should] be appropriated or devoted to any institution” that “is teaching ... a doctrine that is not common to all the people of the Commonwealth.”⁵³ Education should be based upon “only those principles, which are laid down by public officers and public agents.”⁵⁴ A blanket ban on any support of “sectarian” institutions of any kind was proposed.⁵⁵

In the face of the threat to expand the Anti-Aid Amendment to cover even more (and exclusively Catholic) institutions, Martin Lomasney—a Catholic ward boss, state legislator, and delegate—joined with a Protestant minister to advocate for a version of the Anti-Aid Amendment that applied broadly to all private institutions. The apparent goal was to remove this “potentially explosive question” of aiding Catholic schools from the Commonwealth’s politics.⁵⁶ Meanwhile, “most non-Catholics seemed willing to sacrifice state aid to other private institutions as the price of barring aid to parochial schools.”⁵⁷

⁵¹ 1917 Debates, *supra* note 6, at 92.

⁵² *Id.* at 93.

⁵³ *Id.* at 157.

⁵⁴ *Id.* at 157–58.

⁵⁵ *Id.* at 44–45.

⁵⁶ John D. Buenker, *The Mahatma and Progressive Reform: Martin Lomasney as Lawmaker, 1911–1917*, 44 *New Eng. Q.* 397, 415 (1971).

⁵⁷ *Id.* at 415. This was by no means the first example of public support for Protestant institutions being sacrificed to maintain the barrier against extending public support to Catholic institutions. For example, the federal government had for many decades been funding denominational educational and other pro-

Despite strong opposition from many in the Catholic community, the expanded Anti-Aid Amendment passed. The Anti-Aid Amendment, as modified, thus barred public support of “any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers.”⁵⁸ And it was soon ratified by the people of Massachusetts. The *New York Times* described the measure as achieving “peace” among religious denominations.⁵⁹ Yet that purported peace came at a price: a measure aimed at Catholic schools became one denying public support also to Protestant and other schools offering alternatives to the state-defined message provided by schools under direct government management.

Yet the 1917 Convention’s work with the Anti-Aid Amendment was not quite done. The Convention also adopted an amendment to the Massachusetts Constitution to allow Massachusetts voters to amend the Constitution by initiative. But the Convention specifically excluded the Anti-Aid Amendment from its reach—voters, on their own, would not be allowed to alter it.⁶⁰ It is surely no accident that the Anti-Aid Amendment was excluded from the initiative process, thereby excluding direct constitutional change by the growing immigrant population that may oppose it.

grams on Indian reservations, until in the 1890s Protestant denominations began to refuse such funding. “Rather than joining with Catholics in calling for public funding of all church-sponsored schools serving the Indians, most Protestant groups came to oppose such funding even for their own schools in order to be consistent with their opposition to public funds for urban parochial schools.” Charles L. Glenn, *American Indian / First Nations Schooling* 68 (Palgrave Macmillan 2011).

⁵⁸ Mass. Const. amend. XLVI, § 2 (1917).

⁵⁹ *Religious Liberty in Massachusetts*, N.Y. Times (Nov. 8, 1917).

⁶⁰ Mass. Const. amend. XLVIII (1917).

Nor was it a coincidence that the changes to the Anti-Aid Amendment occurred around the same time as Nebraska’s 1919 Siman Law, which prohibited in both public and private schools the instruction of students in certain foreign languages, *Meyer*, 262 U.S. at 400–01, and Oregon’s Compulsory Education Act, which required public school attendance, *Pierce*, 268 U.S. at 534. This Court, in finding both of those laws unconstitutional, vindicated the freedom of parents to choose the form of schooling best suited to their hopes for their children. And in reaching those decisions, the Court rebuffed direct efforts by the states to limit parental authority and to force children into schools as a means of shaping them in the government mold.

The Massachusetts Anti-Aid Amendment is cut from the same cloth. The Anti-Aid Amendment, as modified in 1917, did not correct an injustice, so much as ensure more were subject to it. And like Nebraska’s 1919 Siman Law and Oregon’s Compulsory Education Act, it reflected a worldview that the state should seek to “standardize its children by forcing them to accept instruction from public teachers only.” *Pierce*, 268 U.S. at 535. And it reflected a conviction that the state, not parents or private societies, should be supreme in shaping the future.⁶¹

In short, the Anti-Aid Amendment is an outdated relic of an era that had little appreciation for democratic pluralism—the belief that a healthy society is built upon diverse communities that negotiate and re-

⁶¹ The Massachusetts legislature once again amended the Anti-Aid Amendment in 1974, this time to allow for narrow grants-in-aid to private higher educational institutions. *See* Mass. Const. amend. CIII (1974). The legislature also restyled the text of the Anti-Aid Amendment but otherwise made no substantive changes to the scope of the prohibition on public support for private primary and secondary schools. *See id.*

The 1974 amendments to the Anti-Aid Amendment do not erase its tarnished past or the injuries it still inflicts. *See Espinoza*, 591 U.S. at 497 (Alito, J., concurring).

spect different viewpoints and traditions. It is a belief, too, that the best educational system to produce citizens for such a society is a system where education may be pursued in schools with distinctive missions and that parents have the right to entrust their children's education to those schools based on their own shared understanding of the requirements for human flourishing.⁶² In recent decades, Massachusetts has recognized, through the support of public magnet schools and charter schools, that it is legitimate to give parents a choice among schools that pursue such distinctive missions. The Anti-Aid Amendment remains, from a bygone time, a fundamental impediment to the exercise of that choice.

* * *

“[F]or most men and women,” as John Coons pointed out, “the right to form families and to determine the scope of their children’s practical liberty is ... the primary occasion for choice and responsibility.”⁶³ One does not need to be “rich or well placed to experience the family” or to “attempt the transmission of one’s own deepest values to a beloved child.”⁶⁴ Rather, it is a universal and fundamental right of all parents that this Court has long recognized.

To the extent the Massachusetts Anti-Aid Amendment places impermissible conditions on that right, it is unconstitutional.

⁶² Ashley R. Berner, *No One Way to School: Pluralism and American Public Education* 116 (Palgrave Macmillan 2017).

⁶³ John E. Coons, *Intellectual Liberty and the Schools*, 1 Notre Dame J.L. Ethics & Pub. Pol’y 495, 511 (1985).

⁶⁴ *Id.* at 511.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MATT GREGORY

Counsel of Record

JOHN W. TIENKEN

JASON H. BAE

GIBSON, DUNN & CRUTCHER LLP

1700 M Street, N.W.

Washington, D.C. 20036

(202) 955-8500

mgregory@gibsondunn.com

Counsel for Amicus Curiae

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