COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13877

CLAIRE FITZMAURICE & OTHERS,

Plaintiffs-Appellees,

v.

CITY OF QUINCY & ANOTHER,

Defendants-Appellants.

On Appeal from a Decision of the
Superior Court in Norfolk County

BRIEF OF MASSACHUSETTS FAMILY INSTITUTE AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DECISION BELOW

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CORPORATE DISCLOSURE STATEMENT

Massachusetts Family Institute, Inc. is a nonprofit corporation based in Acton, Massachusetts, with no parent corporation and no stockholders.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Founded in 1991, Massachusetts Family Institute (MFI) is a nonprofit, nonpartisan organization that engages in research, education, and advocacy efforts related to parental rights, religious liberty, educational freedom, and free speech, and other issues. As part of its faith-based mission, MFI seeks to protect, preserve, and promote the religious roots of our Commonwealth and the enduring values upon which it was built.

MFI believes that our society is better off when we celebrate, rather than suppress, our religious heritage. We file this brief to advance the proposition that our local governments need not purge religion from the public square in order to protect religious liberty; rather, this liberty is advanced when faith is acknowledged and honored in public.

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amicus curiae* and its counsel made any monetary contribution to fund the preparation or submission of this brief. And neither *amicus curiae* nor its counsel represents or has represented one of the parties in this or any other proceeding involving similar issues.

SUMMARY OF THE ARGUMENT

Both the decision of the Superior Court below and Plaintiffs' briefing before this Court largely omit a discussion of the original meaning of Article 3 of the Declaration of Rights, as amended by Am. Article 11. This is telling, given that this Court has, time and time again, instructed that a constitutional provision should be interpreted according to its common meaning at the time of its adoption. *General Outdoor Advertising Co. v. Department of Public Works*, 289 Mass. 149, 158 (1935). When one delves into art. 3's original meaning, it becomes apparent that Quincy's statues do not transgress the Article's protections.

As a preliminary matter, this brief argues that art. 3 *should* be interpreted in accordance with its original meaning, rather than in accordance with federal Establishment Clause precedents or using the "comprehensive" or "context-informed" approaches advocated by the Superior Court and Plaintiffs. Because the texts of the federal Clause and art. 3 are so markedly different, this Court should not simply follow federal precedents when determining the Article's meaning. And the "comprehensive" approach does not fit art. 3 because that approach was

designed to address unenumerated "liberties" found in substantive due process protections which may evolve over time according to changing understandings of liberty. In contrast, applying this approach to enumerated rights such as those contained in art. 3 would render the clear texts and historical purpose of these rights irrelevant, since evolving community values would always trump original meaning. Art. 3's original meaning provides a strong and reliable anchor from which this Court may apply the Article's protections to modern circumstances.

An examination of the original meaning of art. 3 and am. art. 11, using legislative history, contemporary public discourse, and early precedents from this Court disproves Plaintiffs' argument that these Articles were meant to purge religion from public life. Instead, this evidence shows that debates around art. 3 were centered almost entirely on the Article's parish tax requirement. Am. art. 11 was introduced specifically to eliminate this requirement after it had caused resentment among many Massachusetts citizens, but none of the legislative history surrounding this amendment ever mentions banning the public promotion of religion, much less outlawing religiously affiliated art on government buildings. Even more importantly,

legislators and early decisions of this Court interpreted the equal protection and non-subordination language of art. 3's fifth paragraph narrowly, to prohibit only the establishment of a state church or the legal coercion of religious belief or practice. These discussions and decisions indicate that art. 3, originally or as amended, would have no application to the government's use of religious imagery on a public building. In sum, Plaintiffs' interpretation of art. 3 simply has no support in the historical record. It should therefore be rejected.

ARGUMENT

I. Article 3 Should Be Interpreted in Accordance with Its Original Meaning

This Court has long held that the words of a provision of the Massachusetts Constitution "are to be given their natural and obvious sense according to common and approved usage at the time of its adoption." *General Outdoor Advertising Co.,* 289 Mass. at 158 (citations omitted); *McDuffy v. Secretary of Executive Office of Educ.,* 415 Mass. 545, 560 (1993). But Plaintiffs urge the Court to abandon this time-tested approach and instead take one of two alternative paths: either follow *Lemon v. Kurtzman,* 403 US 602 (1971), an overruled federal

precedent that addressed a distinctly different federal clause, or alternatively, use a "comprehensive" interpretive approach that would ignore the text and history of art. 3 and substitute modern preferences for original meaning. Pls.Br. 27-28; 42-44. The Court should reject both of these approaches for the following reasons.

A. Article 3 should not be interpreted in lockstep with *Lemon* or other federal precedents.

First, this Court should not simply follow *Lemon,* or other Establishment Clause precedents, when interpreting art. 3. It has declined to march in lockstep with other federal cases – even ones which are still good law – in myriad other contexts. *See, e.g., Commonwealth v. Caetano*, 470 Mass. 774, 778 n. 4 (2015) (right to bear arms); *Diatchenko v. District Attorney for the Suffolk Dist.,* 466 Mass. 655, 668 (2013) (cruel and unusual punishments); *Attorney Gen. v. Desilets,* 418 Mass. 316, 321 (1994) (free exercise of religion); *Batchelder v. Allied Stores International, Inc.*, 388 Mass. 83, 88-89 (1983) (electoral activities). Instead, this Court construes each Massachusetts constitutional provision "in the light of the circumstances under which it was framed, the causes leading to its adoption, the imperfections hoped to be remedied, and the ends designed to be accomplished."

General Outdoor Advertising Co., 289 Mass. at 158 (citation omitted); *see also Barron v. Kolenda,* 491 Mass. 408, 416 (2023) (carefully examining the "distinct, identifiable […] text, history, and purpose" of art. 19). And when parallel state and federal constitutional provisions use different texts, this is a clear indication that they are likely to have different meanings. *Libertarian Ass'n of Mass. v. Sec'y of the Commonwealth*, 462 Mass. 538, 558 (2012) ("In [*Batchelder*], we relied, in large measure, on differences in the language of art. 9, which does not require State action, and that of the First and Fourteenth Amendments, which do.") (citing 388 Mass. at 88-90).

Here, Article 3 and the Establishment Clause use markedly different language. While the Establishment Clause states in simple, general terms that "Congress shall make no law respecting an establishment of religion," art. 3, as amended by am. art. 11, contains specific language that accomplishes two main purposes: first, it addresses public support for religious institutions; and second, it contains a clause guaranteeing equal protection under the law for all religious sects and declaring that "no subordination of any one sect or denomination to another shall ever be established by law." The equal

protection and non-subordination language of this fifth paragraph, which is the portion of art. 3 primarily at issue in this case, has no parallel in the federal Establishment Clause. This indicates that the different texts of each provision express different (even if related) concepts.

The timing of the adoption of the state and federal clauses bolsters this argument. It is notable that when am. art. 11 was ratified in 1833, decades after the federal Establishment Clause was adopted, it neither replaced the original language of art. 3's fifth paragraph, nor did it otherwise adopt the "establishment of religion" language of the federal clause. If Massachusetts had wanted to amend art. 3 to mirror the federal Establishment Clause, it could have simply copied the federal language (as, for example, when it adopted am. art. 46, sec. 1, which directly mirrors the federal Free Exercise Clause). That the state and federal clauses continue to use different language strongly indicates that they were not meant to be interpreted in lockstep. This Court should therefore not allow federal precedents to cloud its view of the unique text, history, and purpose of art. 3. The Article should be interpreted with its own original meaning in view.

B. Article 3 should not be interpreted using the "comprehensive" approach advocated by Plaintiffs and the Superior Court.

This Court should also reject the call to interpret Article 3 using the "comprehensive" or "context-informed" approaches to constitutional interpretation advanced by Plaintiffs and the Superior Court. *See* Pl.Br.42-44; II.App.324. The Superior Court relied heavily on *Kligler v. Attorney General,* 491 Mass. 38 (2022), to reject the "historical practices and understandings" analysis used in recent federal Establishment Clause cases and to conclude that this Court would instead use a comprehensive approach to find that Quincy's statues violate art. 3. II.App.324. Under this approach, according to the Superior Court, it used its "reasoned judgment" to "ensure that [the] promise of Article 3 is fulfilled" and held that Quincy's statues were unconstitutional. *Id.* at 324; 329-30. While the court implicitly acknowledged that the framers of the Declaration of Rights would not have understood art. 3 to ban Quincy's statues, it held that ruling in accordance with this original understanding would "perpetuate the petty bigotries of the past." *Id.* at 329. Plaintiffs mirror these arguments in their briefing. Pl.Br.42-44.

But this "comprehensive approach" is simply inapposite here. The issue at hand in *Kligler* was whether assisted suicide qualified as a fundamental *unenumerated* right under the Massachusetts Constitution's substantive due process protections. 491 Mass. at 40. This Court looked to *Obergefell v. Hodges,* 576 U.S. 644, 664 (2015) and held that, when identifying unenumerated fundamental rights via substantive due process, it would not confine itself only to an analysis of history, tradition, and original meaning, but would also consider changing community values. *Kligler,* 491 Mass. at 61 (citation omitted). Part of the rationale for this approach stems from the capacious nature of ideas of "due process" and "liberty." *See id.* at 58 ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.") (quoting *Obergefell,* 576 U.S. at 664). But nothing in *Kligler* indicated that this comprehensive approach was appropriate to employ outside the context of determining substantive due process rights. In fact, this Court explicitly described the approach as "the comprehensive

approach *to substantive due process*." *Kligler,* 491 Mass. at 62 (emphasis added).

The comprehensive approach does not fit when the constitutional provision at issue contains definite and specific language designed to enumerate particular rights. Were this Court to apply *Kligler's* approach to *enumerated* rights, these rights would cease to have any fixed meaning at all. If modern community values were to be the touchstone of constitutional interpretation rather than the original meaning of the text of the Constitution, there would be no use in having a constitution; the text would always give way to public preference, as ascertained by this Court. Article 3 has a specific and definite meaning that is discernible from its text, the historical record, and the context in which it was adopted. The Court should decline Plaintiffs' invitation to dispense with art. 3 and to instead adopt Plaintiffs' own preferences regarding the separation of religion from public life.

In sum, this Court should neither use the "comprehensive approach" applicable to substantive due process rights in this case, nor should it simply follow federal Establishment Clause precedents. Instead, it should do what it has always done when interpreting any

provision of the Massachusetts Constitution: give its words "their natural and obvious sense according to common and approved usage at the time of its adoption." *General Outdoor Advertising Co.,* 289 Mass. at 158. Applying this straightforward framework as discussed below, one comes to the unavoidable conclusion that Appellant's statues will not violate art. 3.

II. Quincy's Proposed Statues Do Not Offend the Original Meaning of Article 3

Article 3's original meaning can be ascertained from its legislative history, the historical discourse surrounding its adoption and implementation, and early precedents applying it in particular cases. All such available historical evidence indicates that the Article was originally understood to specifically address the public funding of religious organizations, not to create a broad prohibition against the intermingling of Church and State. The fifth paragraph of art. 3, which contains the language concerning the non-subordination and equal protection of religious sects, was historically understood to prohibit only the coercive, legal subordination of one religious sect to another. As such, under its original meaning, art. 3 simply has no application to public art with religious significance such as Quincy's statues.

A. The legislative history and public discourse surrounding Article 3 almost exclusively concern the public funding of religious organizations.

Article 3's legislative history and the contemporary discussions that members of the public had about the Article and its 1833 amendment revolved almost entirely around the issue of public funding for churches. There do not appear to be *any* discussions in the historical record regarding the Article's effect on public religious displays, and there is simply no evidence that Article was drafted to create a sweeping ban on governmental promotion of religion. Rather, all existing historical evidence indicates that the Article was first enacted to require public support for religion and then amended in response to popular opposition to this requirement – all while ensuring that no religious denomination was rendered legally subordinate to any other.

A brief survey of the history of art. 3 is instructive. Of course, the original version of art. 3 *required* public support for religious organizations at the local level. This ultimately reflected a compromise between those who wanted a more formally established state church and those who believed no public funds should ever be spent to support

any church.[2] Article 3 was the only provision of John Adams's 1779 draft of the Massachusetts Constitution that Adams himself did not author, purportedly because he did not believe he could adequately strike this compromise.[3] As Adams explained, "I could not satisfy my own Judgment with any Article that I thought would be accepted: and farther that Some of the Clergy, or older and graver Persons than myself would be more likely to hit the Taste of the Public."[4]

Yet, art. 3 proved to be the most controversial provision of the Declaration of Rights, leading to over a week of contentious debate.[5] The journal of the constitutional convention provides few details about the substance of these debates or the many amendments to art. 3 that were proposed.[6] Based on other historical records, however, it is apparent that the major source of controversy surrounding art. 3 was

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[2] John Witte, Jr., *A Most Mild and Equitable Establishment of Religion: John Adams and the Massachusetts Experiment*, 41 J. Church & St. 213, 229 (1999).
[3] Letter of John Adams to William D. Williamson, Feb. 25, 1812, Maine Historical Society, *available at* https://founders.archives.gov/documents/Adams/99-02-02-5762.
[4] *Id.*
[5] S.E. Morison, *The Struggle over the Adoption of the Constitution of Massachusetts, 1780*, 50 Proceedings of the Massachusetts Historical Society 353 (May 1917), 368 (hereinafter "Morison, 'Struggle'"); *see also* Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 Proceedings of the American Antiquarian Society 317 (Oct. 1980), 331-333.
[6] *See Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay*, Dutton and Wentworth (1832), 45-47, *available at* https://catalog.hathitrust.org/Record/001143752.

the Article's requirement that citizens pay a tax to support their local parish, to which Baptists in particular stridently objected.[7] These objections were rooted in fears that the Article would undermine religious liberty by establishing a de facto requirement that citizens support their local Congregationalist parish (since Congregationalism was the major denomination in Massachusetts), even if they were Baptist, Unitarian, Catholic, or another denomination.[8] Their fears were well-founded, since this is exactly what happened in many towns where there were not enough people in a given denomination to establish an incorporated local parish, and the courts did not recognize an unincorporated religious society as legally entitled to the parish tax.[9]

Nevertheless, at the time it was adopted, the proponents of art. 3 saw no conflict between its requirement of tax support for specific churches on the one hand and the state constitution's guarantee of religious liberty and the rights of conscience on the other. An address by James Bowdoin, president of the 1779 Massachusetts constitutional convention, is worth quoting at length on this point:

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[7] Morison, "Struggle" at 372.
[8] *Id.* at 371.
[9] *Id.* at 371; *see also Caplan v. Acton,* 479 Mass. 69, 76-77 (2018).

> In the third article of the Declaration of Rights, we have, with as much Precision as we were capable of, provided for the free exercise of the Rights of Conscience. We are very sensible that our Constituents hold those Rights infinitely more valuable than all others; and we flatter ourselves, that while we have considered Morality and the public Worship of GOD, as important to the happiness of Society, we have sufficiently guarded the rights of Conscience from every possible infringement.[10]

Bowdoin went on to state,

> Your Delegates did not conceive themselves to be vested with Power to set up one Denomination of Christians above another; for Religion must at all Times be a matter between GOD and individuals.[11]

The framers of art. 3 were well aware of the objections of Baptists and others that the Article would require members of minority denominations to support other churches. But Bowdoin and others like him did not see this requirement as an infringement on the rights of religious conscience, nor as setting up one Christian denomination over another, denying equal protection, or creating a "subordination" of sects, as the fifth paragraph of art. 3 termed it.

By the early 1830s, however, it had become clear to the people of Massachusetts that the system of religious assessments created by art.

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[10] James Bowdoin, *An Address of the Convention for Framing a New Constitution of Government for the State of Massachusetts Bay, to Their Constituents*, 1780 *in Journal, supra* n. 6 at 218.
[11] *Id.* at 220.

3 was unworkable and the Article needed to be amended. As this Court has noted, art. 3 had led to five decades of "lawsuits, bad feeling, and petty persecution" between denominational majorities and minorities regarding the parish tax requirement. *Caplan,* 479 Mass. at 76 (citing Morison, "History" at 24).

Contemporary newspaper articles provide valuable insights into the reasons that Article 11 of the Amendments to the Constitution was introduced. As one anonymous writer in the *Springfield Weekly Republican* put it, "although the mass of the people had acquired the right to vote in the election of a minister, the minority were liable to be taxed for the support of a minster whose preaching enforced doctrines they not only disbelieved, but abhorred."[12] This, the writer argued, was the last remaining impediment to true religious freedom in the Commonwealth.[13] Another newspaper article noted that "[a]bout two hundred petitions, from various parts of the commonwealth, have been presented to the Legislature […] praying for a modification or an entire

[12] "Cornelius," *Progress of Religious Freedom*, Springfield Weekly Republican, June 22, 1831.
[13] *Id.*

abolition of the third article of the Bill of Rights."[14] These petitions listed a number of reasons for their request, but the following is illustrative:

> The effect of compelling people to support religion is highly injurious. – Men never were made to have any respect for religion, by being *compelled to support it*. Such a course generates hatred and opposition. Religion cannot have a good influence upon any man, any further than it is a matter of conscience and opinion with him. – Where it is a matter of conscience, it will always be supported cheerfully and abundantly ; and where it is not, a compulsory support produces only hatred and irreligion.[15]

The people of Massachusetts clearly believed it was time to dispense art. 3's parish tax requirement.

Committee reports recommending passage of the bill that would become am. art. 11 also emphasized the problems that had arisen out of art. 3. As a House committee commissioned to report on the proposed amendment stated, "in many cases where the laws founded on the Third Article of the Bill of Rights have been carried into effect, the result has been to exasperate the citizens, to create disgust against the institutions of religion, to injure the original parishes themselves, and

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[14] *Third Article*, Springfield Weekly Republican, Jan. 21, 1832 (reprinted from the Boston Courier).
[15] *Id.* (emphasis in original).

to lead to intrigue and cunning to evade the effect of the laws."[16] For these reasons, by the early 1830s, most parishes were no longer collecting the taxes which they were legally due.[17] The report of the Senate committee considering the amendment noted that its purpose was "that no person should, in future, be compelled to contribute any thing toward the support of religious instruction or public worship."[18] The Senate Judiciary Committee recommended that the amendment be rejected, but its reason was because the committee favored maintaining public support for churches.[19] None of the legislative history or contemporary discourse surrounding the amendment, however, appears to have dealt with government-sponsored religious displays or other types of public support for religion; rather, the entire discussion revolved around whether the parish tax requirement should be abolished.

Thus, neither the historical record concerning art. 3's original ratification, nor its amendment decades later, provide any support to the argument that the Article was originally meant to erect a wall of

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[16] 1833 House Doc. No. 4 (Jan. 8, 1833).
[17] *Id.*
[18] 1833 Senate Doc. No. 13 (Jan. 18, 1833).
[19] 1832 Senate Doc. No. 22 (Feb. 16, 1832).

separation between Church and State that would forbid public religious art. Instead, the evidence indicates that the Article chiefly concerned public funding for churches and had little to do with anything else.

Plaintiffs argue in their briefing to the contrary that the amendments of am. art. 11 "were not enacted solely to end a targeted assessment regime" and that "[t]he Massachusetts disestablishment struggle was much broader, reflecting a sustained opposition to the Commonwealth's use of civil power to privilege certain denominations, to identify other denominations as dissenters, and to deny those dissenters equal standing." Pls.Br.46. It is true, as discussed above, that part of the reason that the people of Massachusetts wanted to amend art. 3 was that it disadvantaged smaller denominations for tax purposes and thus caused resentment among their members. But context is important: the kind of unequal treatment that the people objected to, and that am. art. 11 addressed, was specifically the unequal application of art. 3's parish tax requirement. And even if some Massachusetts citizens may have wanted to go farther than ending religious assessments, the text of am. art. 11 did no more than this. As discussed below, the text of art. 3's fifth paragraph, which is the provision at issue

in this case, remained untouched, except for language broadening its application to non-Christian religious sects. All historical evidence points to the conclusion that art. 3 was amended not as part of a crusade against religion in public life, but for the narrow purpose of abolishing the parish tax that so many citizens had come to oppose.

B. The legislative history and early precedents concerning the fifth paragraph of Article 3 indicate that it has a narrow application.

The history of the fifth paragraph of art. 3 Cuts even more strongly against Plaintiffs' position. In particular, early precedents of the Supreme Judicial Court held that the fifth paragraph narrowly restricted the government from establishing a regime of legal coercion of religious belief or practice. This evidence indicates that the Article simply has no application to religiously affiliated monuments on government property.

As discussed above, the drafters of art. 3 saw no conflict between the Article's requirement that citizens support a local church with their tax dollars, even one which they did not agree with, and the language of non-subordination and equal protection in paragraph five of the Article. The Supreme Judicial Court agreed with this sentiment.

In the 1810 case of *Barnes v. Inhabitants of the First Parish in Falmouth,* this Court held that a Unitarian minister was not entitled under art. 3 to receive the taxes of his congregation because his church was an unincorporated religious society. 6 Mass. 401 (1810). The Plaintiff had argued that favoring the local Congregationalist church over his church for tax purposes violated the fifth paragraph of art. 3 by creating a "subordination" of one Christian church to another. *Id.* at 416. In response, this Court stated that paragraph five of art. 3 was simply inapplicable to the case. *Id.* at 416-17. The Court explained that "[i]ts object was to prevent any hierarchy, or ecclesiastical jurisdiction of one sect of Christians over any other sect" and that "[i]t was also intended to prevent any religious test, as a qualification for office." *Id.* at 416. But the fifth paragraph was not intended, according to the Court, to place all churches on equal footing when it came to receiving taxes under art. 3. The Court pointed out that, if the Plaintiff's interpretation was correct, then this would mean that Roman Catholic parishes (as members of a Christian denomination) would also be entitled to receive their parishioners' taxes, notwithstanding art. 3's exclusive application to "Protestant" teachers of piety. *Id.* at 417. Thus,

favoring some churches over others for tax purposes could not be "subordination" or denial of equal protection within the meaning of the Article.

The Court emphasized in *Barnes* that "by the third article, [citizens] are not obliged to attend on the instructions of any teacher, whom they cannot conscientiously hear. The inconvenience, therefore, is merely pecuniary, and of no great magnitude." 6 Mass. at 415. According to the Court, by protecting citizens from compulsory church attendance, preventing the legal submission of one denomination to another, and prohibiting religious tests that favored any specific denomination of Christians, the fifth paragraph of art. 3 sufficiently safeguarded rights of religious conscience.

This Court reaffirmed its view of art. 3's fifth paragraph a few years later in the case of *Adams v. Howe,* 14 Mass. 340 (1817). This case involved a challenge to a law passed in response to the *Barnes* case. This new law now explicitly allowed members of unincorporated religious societies to be exempt from the parish tax. *Id.* at 344. In upholding the constitutionality of this statute, the Court again addressed art. 3, holding that it did not restrict the legislature from

enacting such exemptions. *Adams,* 14 Mass. at 347-48. In so holding, the Court outlined what restrictions art. 3 *did* contain:

> The restrictions upon the legislature are against any exercise of authority which might contravene the rights of conscience or the choice of forms of worship, and against the establishment of any national or state creed, or form of worship, to which those who conscientiously disagreed should be obliged to conform, or suffer any inconvenience from nonconformity. *Id.* at 347.

The Court stated that, along with establishing liberty of conscience and requiring the public worship of God, one of the other "great objects" of art. 3 was "[t]o deny the right of establishing any hierarchy, or any power in the state itself, to require conformity to any creed or formulary of worship." *Id.* In sum, the Court stated that the fifth paragraph of art. 3 prevented the establishment of 1) a hierarchy of one church over others; 2) legally enforced conformity to a national or state creed; or 3) legally enforced conformity to an officially prescribed mode of worship.

The *Adams* and *Barnes* cases strongly support a narrow construction of art. 3's fifth paragraph. These cases are highly relevant to determining the original meaning of this provision, since the Justices were writing just a few decades after the Article's ratification and would therefore have had a significantly better grasp on its drafters' intentions and the public's understanding of its text than we do today.

In the view of these Justices, the purpose of the fifth paragraph of art. 3 was to prevent the legal coercion of religious beliefs or practices or the establishment of a state church. The Article did not prevent citizens from being taxed to support a church; it only prevented compelled church attendance, adherence to a specific creed, or conformity to a particular mode of worship.

It is notable that art. 3 was amended by am. art. 11 two decades *after* the *Barnes* and *Adams* decisions, but no changes were made to the equal protection and non-subordination guarantees of art. 3's fifth paragraph. Had the Legislature wanted to overrule the holdings of these cases and enact Plaintiffs' sweeping understanding of the equal protection and non-subordination language, it could have amended art. 3 to do so. But it did not. Since this Court "presume[s] that the Legislature is aware of the prior state of the law as explicated by [its] decisions," it can be inferred that the Legislature did not intend to alter the narrow interpretation of art. 3's fifth paragraph. *See, e.g.*, *Commonwealth v. Callahan*, 440 Mass. 436, 441 (2003) (quotation and citation omitted). Am. art. 11 did make an important change to the fifth paragraph by broadening its protections to cover not only "every

denomination of Christians," but "all religious sects and denominations".[20] But no other changes were made, and there is no indication in the historical record that when am. art. 11 was ratified, the words "equal protection" and "subordination" had come to mean anything different from what they had meant when art. 3 was adopted in 1780.

In fact, this Court rejected a constitutional challenge under am. art. 11 to a Sunday closing law many decades later, in 1877, on the same grounds outlined in the *Barnes* and *Adams* decisions: the law "impose[d] upon no one any religious ceremony or attendance upon any form of worship" and therefore did not constitute the subordination of any religious sect to another. *Commonwealth v. Has*, 122 Mass. 40, 42 (1877). This provides further evidence that the original meaning of art. 3's non-subordination and equal protection provisions did not change after they were amended in 1833. Am. art. 11 merely extended these same protections, prohibiting the State from setting up a state religion or legally coercing religious belief or practice, to non-Christian religious

[20] Notably, there does not appear to be legislative history related to this particular change.

sects. In sum, there is no historical support for the proposition that the protections of art. 3's fifth paragraph were originally understood to forbid the government from celebrating or promoting religion in public spaces.

C. Quincy's statues do not violate the non-subordination or equal protection components of Article 3 as originally understood.

The history discussed above demonstrates first that art. 3 was drafted to address the issue of public funding for religious institutions, and second, that the language of its fifth paragraph regarding equal protection and non-subordination was meant to impose a specific restriction on legal coercion of religious belief or practice by the government. Based on these principles, it is apparent that Quincy's statues do not violate the Article.

Quincy's statues do not deny any religious sect equal protection of the law or result in the subordination of one sect to another. They do not mirror any of the kinds of conduct discussed in *Adams* that would violate art. 3: establishing a state church, forcing attendance at a specific church, requiring subscription to a particular creed, or prescribing a particular mode of worship. *See* 14 Mass. at 347. And if, as

this Court held in *Barnes,* requiring taxes to be paid to a specific church does not constitute the subordination of one sect to another, it is inconceivable that erecting a statue with religious themes on public property would constitute such subordination. *See* 6 Mass. at 416-17.

Plaintiffs argue in their briefing that they have experienced subjective, psychological feelings of subordination as a result of the statues: they claim that they feel like "second-class citizens" because they are not Catholic and fear that they will not be treated equally or served adequately by the police and fire departments because of their unbelief. Pls.Br.22. But these are simply not the kinds of claims that trigger art. 3's equal protection and non-subordination provisions. If they were, an untold amount of religious imagery (such as religious statues on this Court's courthouse), language (including all references to God in our laws and Constitution), and traditions (such as legislative prayer or the observance of religious holidays) would need to be purged from public life to avoid creating such feelings of subordination. *See* Defs.Br.21-25; 45-46. Again, it is unthinkable that Massachusetts citizens would have understood art. 3, in its original form or as amended, to require such an extreme result. If they had, it almost

certainly would not have been ratified, and the historical record would be filled with controversy over its terms. For these reasons, Quincy's statues do not transgress the original meaning of art. 3.

Conclusion

This Court should uphold the original meaning of art. 3, reverse the order of the Superior Court, and remand the case for a judgment of dismissal.

RULE 16(K) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with all of the rules of court that pertain to the filing of amicus briefs, including, but not limited to, the requirements of Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. This brief complies with Mass. R. App. P. 20(a)(2)(C) because it has been produced in proportionally spaced typeface using Century Schoolbook 14-point font and, excluding the parts of the brief exempt by Mass. R. App. P. 20(a)(2)(D), contains 5,625 words.

Dated: April 10, 2026

/s/ Samuel J. Whiting

Samuel J. Whiting
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2026, I electronically filed the foregoing amicus brief with the Clerk of the Court for the Massachusetts Supreme Judicial Court, which will accomplish service on counsel for all parties through the Court's electronic filing system. I further certify that I have served copies of the brief by email on the following counsel of record for the parties:

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