Appeal No. 09-2002

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

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THEODORE GRISWOLD;
HIS PARENT AND NEXT FRIEND THOMAS GRISWOLD;
JENNIFER WRIGHT;
HER PARENT AND NEXT FRIEND, RAYMOND WRIGHT;
DANIEL GLANZ;
HIS PARENT AND NEXT FRIEND, RICHARD GLANZ;
WILLIAM SCHECHTER; LAWRENCE AARONSON; AND
ASSEMBLY OF TURKISH AMERICAN ASSOCIATIONS,
APPELLANTS
v.
DAVID P. DRISCOLL, COMMISSIONER OF EDUCATION,
MASSACHUSETTS DEPARTMENT OF EDUCATION;
JAMES A. PEYSER, CHAIRMAN,
MASSACHUSETTS BOARD OF EDUCATION;
THE DEPARTMENT OF EDUCATION FOR THE COMMONWEALTH OF MASSACHUSETTS;
AND
THE MASSACHUSETTS BOARD OF EDUCATION,
APPELLEES

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ON APPEAL FROM THE FEDERAL DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

**BRIEF OF AMICUS CURIÆ TURKISH AMERICAN LEGAL DEFENSE FUND**

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## CORPORATE DISCLOSURE STATEMENT

TALDF is an arm of the Turkish Coalition of America ("TCA"), a 501(c)(3) non-profit charitable and educational organization incorporated under the laws of Massachusetts, with offices in Concord, MA and Washington, DC. The TCA has no parent corporation and, it has no stock.

## STATEMENT OF INTEREST

The Turkish American Legal Defense Fund (TALDF) is an arm of the Turkish Coalition of America, a section 501(c)(3) organization under the Internal Revenue Code. TALDF was formed to assert and to protect free speech, constitutional, or legal interests of Turkish Americans. Its authority to file an amicus curiae brief is derived from TALDF's outstanding motion before this Court for leave to file.

## STATEMENT OF ISSUE ON APPEAL

Whether the First Amendment to the United States Constitution limits the power of non-education state officials to purge an educationally credentialed viewpoint in a historical controversy that offends a powerful voting constituency, thus engaging in the electronic equivalent of book burning.

## STATEMENT OF THE CASE

Massachusetts state educational experts, based on their professional judgments, included in the *Massachusetts Guide to Choosing and Using Curricular Materials on Genocide and Human Rights Issues* (the "Guide") four websites that state officials later alleged expressed the contra-genocide thesis in the historical controversy concerning the fate of the Ottoman Armenians during World War I.[1] The Guide is an on-line resource that "offers recommendations for locating and selecting curriculum materials on genocide and human rights issues, and guidelines for the teaching of such materials." *See*, the Guide, available at: http://www.doe.mass.edu/frameworks/news/1999/hr699.html#Introduction (last visited on October 5, 2009). It is not used as textbook or otherwise as classroom material.

The Armenian American community in Massachusetts, 120,000 strong, erupted in anger. *See*, Plaintiff-Appellants' Complaint § 25, 26. As the Complaint alleges, Armenian American organizations and individuals lobbied their friends in the state legislature and Governor's office to remove the particular viewpoint which offended them: namely, that the horrors inflicted on Armenians and others in World War I do not demonstrate the crime of genocide under the 1948 United

[1] The expurgated website of the Institute of Turkish Studies contained no discussion of Ottoman Armenian history.

Nations Convention on the Prevention and Punishment of the Crime of Genocide as applied to Armenians. The educators jettisoned their educational judgments to escape political wrath or retaliation. The websites were expunged, the equivalent of electronic book burning, to mollify the politically powerful Armenian American community of Massachusetts.

Armenian Americans outnumber Turkish Americans by a 6-1 ratio in Massachusetts. Their litmus test for every candidate seeking elected or appointed office is whether they will in their official capacities endorse the Armenian genocide thesis in education or otherwise regarding the events of World War I, even if they know nothing about the historical controversy. All ten members of Massachusetts' delegation to the U.S. House of Representatives belong to the House Caucus on Armenian Issues. Only one belongs additionally to the Congressional Caucus on Turkey and Turkish Americans. Seven of the 10 members of the Massachusetts delegation to the House of Representatives receive an "A" on the Armenian National Committee of America's Congressional Report Card. The remainder receives a "B". Both Massachusetts Senators receive an "A". *See*, http://www.anca.org/legislative_center/election_reportcards.php?state_short=MA&suffix=110&Go=GO (last visited Oct. 5, 2009). Nine of the 10 Massachusetts representatives are presently cosponsors of H. Res. 252, which pursues federal

validation of the genocide thesis. Massachusetts Governor Deval Patrick scored 100% on the Armenian National Committee's questionnaire. *See*, http://www.anca.org/press_releases/press_releases.php?prid=1005.

Further, The Armenian National Committee of Eastern Massachusetts endorses candidates for elective office. *See*, http://www.anca.org/press_releases/press_releases.php?prid=1007. It appears that no Turkish American organization endorses candidates for political office in Massachusetts or has a report card on candidate performance on Turkish American issues.

No candidate for public office in Massachusetts has ever publicly challenged the Armenian thesis, although it is disputed by such reputable Middle East experts as Bernard Lewis of Princeton University and the late Stanford Shaw of U.C.L.A.[2] Others who dispute the genocide thesis when analyzing the history of the late Ottoman Empire include, but are not limited to, Canadian historian Gwynne Dyer, Justin McCarthy of the University of Louisville, Guenter Lewy emeritus of the University of Massachusetts at Amherst, Brian G. Williams of the University of Massachusetts, David Fromkin of Boston University, Avigdor Levy of Brandeis University, Michael M. Gunter of Tennessee Tech, Pierre Oberling of Hunter

[2] The former was criminally prosecuted in France for quarreling with the genocide thesis; the latter's home was firebombed by an Armenian terrorist group for the identical reason.

College, the late Roderic Davison of George Washington University, Michael Radu of Foreign Policy Research Institute, and military historian Edward J. Erickson of the U.S. Marine Corps University. European exponents of a contra-genocide analysis of the history of the Ottoman Armenians include Gilles Veinstein of the College de France, Augusto Sinagra of the University of Roma-Sapienza, Norman Stone of Bilkent University, and the historian Andrew Mango of the University of London.

Armenian Americans fiercely oppose evenhanded debate or even research that might question the validity of the genocide thesis. They routinely denounce persons or organizations that would quarrel with it as complicit in the final stage of an Armenian genocide. *See*, e.g. "ANC Alerts Hampshire College to Its Association with Genocide Denier," The Armenian Weekly, March 5, 2009, available at http://www.hairenik.com/weekly/2009/03/05/anc-alerts-hampshire-college-to-its-association-with-genocide-denier/ (last visited on October 5, 2009) (stating, "genocide denial, … is the highest form of hate speech and the final stage of genocide."). In the 1970s and 1980s, two Armenian terrorist organizations, the Armenian Secret Army for the Liberation of Armenia and the Justice Commandos for the Armenian Genocide, perpetrated a number of harrowing terrorist crimes in the United States and elsewhere against Turkish diplomats or persons of Turkish descent to retaliate against perceived disputants of the genocide thesis. According

to the FBI, during the years 1980-1986, Armenian terrorism accounted for 24.1% of all terrorist incidents in the United States.

Indeed, Turkish Americans in Massachusetts live under the apprehension that to disagree openly with the Armenian American orthodoxy on the genocide controversy is to invite not only rancor, but also violence. Theirs is a first cousin fear to the general dread of blacks during Jim Crow to question segregation or White Supremacy.

On October 12, 1980, Armenian American terrorists bombed Turkish diplomatic offices at United Nations Plaza in New York City. Three Americans were severely injured. Significant damage was done to the Turkish Center that houses the Turkish consulate and U.N. Mission, the B'nai B'rith Building, Chase Manhattan Bank and the African American Center. Mourad Topalian, then head of the Armenian National Committee of America, pled guilty to complicity in the terrorist bombing in the United States District Court for the Northern District of Ohio. Topalian served a prison sentence, yet remains heralded among Armenian Americans. And, as the Boston Globe reported on October 16th, 1999, the indictment against Topalian alleged that Camp Haiastan, in Franklin, Massachusetts was where he demonstrated to campers the use of machine guns and how to build booby traps. *See,* John Ellement, *Camp was Allegedly Used for Terrorist Training: Armenian-American Site in Franklin Named*, Boston Globe,

Oct. 16, 1999**.**

On March 22, 1982 in Cambridge, Massachusetts, a large bomb destroyed a gift shop, Topkapi Imports, seriously wounding its Turkish American owner, Mr. Orhan Gunduz, who also served as the Honorary Turkish Consul in Boston. The latter position is a non-compensated, non-diplomatic office that a U.S. citizen may occupy as the local representative of the Turkish government. The Justice Commandos for the Armenian Genocide ("JCAG") claimed responsibility for the bombing and issued an ultimatum that either Mr. Gunduz resign from his honorary position or be executed. Mr. Gunduz recovered from his injuries, rebuilt his business, and refused to resign. Salespersons at Topkapi Imports commented that the store was without police protection despite threatening protests by Armenian groups.

On May 4, 1982 in Somerville, Massachusetts, a gunman finally succeeded in assassinating Orhan Gunduz while the latter drove in his automobile during rush-hour traffic. The gunman escaped. The JCAG claimed responsibility. To help solve the murder, local television and newspapers utilized a composite drawing based on information provided by a witness. When the witness was subsequently shot, all community efforts to help apprehend the assassin ceased. The assassin was never identified.

On October 22, 1982 at Logan Airport in Boston, the FBI arrested Steven

John Dadaian as he arrived with a briefcase containing five sticks of dynamite and the components of a time bomb transported from Los Angeles. Dadaian was revealed to be a JCAG member recruited from the Armenian Youth Federation. He and four others were convicted of conspiracy to bomb the office of Turkish American Kanat Arbay in Philadelphia. During appeals filed by several of the conspirators, the FBI testified that had their plan succeeded, the death toll would have been 2,000-3,000.

Turkish Americans are understandably reluctant to participate in civil society in Massachusetts or even acquire residence there. Indeed, the Turkish American Cultural Society of New England declined to become a plaintiff in this very lawsuit because its leaders were fearful of retaliation by Armenian Americans.

In contrast, Armenian American groups incessantly lobby for official government recognition of their thesis. The General Court has passed at least two resolutions affirming it. *See* Mass. Gen. Ct. Resolutions of April 19, 1990, and April 13, 2006. The Governor is required to issue an annual proclamation recognizing the Armenian thesis under MGL Chapter 6, Section 15ii (Armenian Martyrs' Day) and Section 15wwww (Armenian Heritage Month). Armenian Americans even successfully lobbied to include their own memorial on the Rose Fitzgerald Kennedy Greenway. It is the sole memorial in the park, even while a

bust of the park's namesake is conspicuously absent.

Further, two Armenian Americans sit in the Massachusetts General Court: Representative Peter Koutoujian and Senator Steven Tolman. No Turkish American has been elected to public office in Massachusetts.

This background casts light on the origins and ethnic favoritism of Chapter 276 of the Massachusetts Session Laws (1998) and its propagandistic implementation by the craven State Board of Education apparently cowed by the local Armenian American lobby. As a consequence, the Guide presented the Armenian thesis as Gospel, and electronically "book burned" - contra-genocide reference materials that *the Board itself had selected based solely on educational and pedagogical suitability* in order to placate apparent Armenian American antagonism toward Turkey and Turkish Americans.

Plaintiff-Appellants filed a First Amendment suit against Defendant-Appellees in order to protect the preeminent role of state and local educators in making educational decisions. The Complaint alleged that Defendants expunged from the resource section of the Guide websites that Defendants themselves had found educationally suitable for the sole purpose of mollifying a politically aroused and powerful Armenian American community intolerant of any idea which contradicts the genocide thesis. The District Court granted Defendants' motion to dismiss for failure to state a claim in a Memorandum and Order issued on June 10,

2009.

The District Court elaborated:

> … [P]laintiffs and those who share their viewpoint concerning the treatment of Armenians in the Ottoman Empire are capable of participating fully in the political process, which provides the opportunity to petition government to alter its policies. [Their efforts] evidently caused the inclusion of the contra-genocide materials in the Curriculum Guide for a period of time. If plaintiffs still want those materials included in the Curriculum Guide, they will have to resume their efforts to prevail in the political arena because they are not entitled to relief in federal court.

Thus, the District Court tacitly lectured Turkish Americans that if they objected to the Government of Massachusetts presenting only one side of the Armenian thesis in public school materials after expunging divergent viewpoints, they should multiply, become rich, make handsome campaign contributions, hire lobbyists, and orchestrate a law that would replace Chapter 276 with a state legislative directive that only contra-genocide viewpoints be available in public schools and that the Armenian thesis be censored. Alternatively, Turkish Americans should exert their bantamweight political clout in Massachusetts to push the Governor into purging the Guide of all ideas they found disagreeable or offensive.

The District Court's advice was as cynical as would have been telling disenfranchised blacks in the South during the heyday of Jim Crow that if they desired to change public school reference materials that depicted them as rapists of

white women, then they should vote out White Supremacist legislators in favor of the likes of Reverend Dr. Martin Luther King, Jr.

The District Court further concluded that the United States Supreme Court decision in *Island Tree School District v. Pico,* 457 U.S. 853 (1982), frowning on book removals by educators from school libraries for narrow partisan or political motivations in order to deny students access to ideas with which the educators or their superiors disagreed, did not apply for twofold reasons: *Pico* did not command a majority opinion; and, it excluded classroom textbooks from its reach indistinguishable from the advisory reference materials in the Guide.

## STATEMENT OF FACTS[3]

The Armenian American community is exceptionally powerful politically in Massachusetts and nationwide. Turkish Americans are substantially weaker in comparison. Not a single Turkish American has been elected to national, state, or local office in Massachusetts. It is common knowledge that Armenian American voters have a litmus test for political candidates or elected or appointed officials: affirmation of the Armenian thesis, and censorship of conflicting points of view.

In August of 1998, the Massachusetts legislature unanimously enacted Chapter 276 of the Session laws. It directed the Board of Education to

[3]Facts are those alleged in the complaint together with attached exhibits, which are taken as true for purposes of deciding a motion to dismiss.

> formulate recommendations on curricular materials on genocide and human rights issues, and guidelines for the teaching of such material. Said material and guidelines may include, but shall not be limited to, the period of the transatlantic slave trade and the middle passage, the great hunger period in Ireland, the Armenian genocide, the holocaust and the Mussolini fascist regime and other recognized human rights violations and genocides. In formulating these recommendations, the board shall consult with practicing teachers, principals, superintendents, and curricular coordinators in the commonwealth, as well as experts knowledgeable in genocide and human rights issues. Said recommendations shall be available to all school districts in the commonwealth on an advisory basis, and shall be filed with the clerk of the house of representatives, the clerk of the senate, and the house and senate chairmen of the joint committee on education, arts and humanities not later than March 1, 1999.

(Comp. Para. 15 App. –). Ethnic and racial politics leap from Chapter 276. The enumerated topics were selected to appease entrenched political constituencies in Massachusetts: African Americans, Irish Americans, Italian Americans, Jewish Americans, and Armenian Americans. Conspicuously omitted from the enumerated atrocities suggested for study was the Srebrenica genocide of Bosnian Muslims and Pol Pot's crimes against humanity in slaughtering Cambodians. Massachusetts laws reflect the election returns and the politically powerful.

Consistent with the language of Chapter 276 and customary educational and pedagogical standards about balance and conflicting points of view, the Commissioner compiled the Guide for presentation to the legislature. It included four supposed contra-genocide websites to complement numerous websites and other materials that affirmed the Armenian thesis. Conflicting views were

similarly presented regarding what is commonly styled "the Irish Potato Famine."

The initial draft of the Guide presented only the affirmative side of the Armenian genocide thesis. Favoring the exploration of multiple viewpoints in an historic controversy, local Turkish Americans did not object to inclusion of the Armenian American viewpoint. In the course of the customary administrative process, however, the Turkish American Cultural Society of New England (TACS-NE) urged the Commissioner of Education and Board of Education to consider adding contra-genocide viewpoints in the resource section and to consult experts such as Guenter Lewy and Justin McCarthy. (The latter was consulted by Susan Wheltle of the Board of Education). TACS-NE engaged in no political lobbying. It contacted no state legislators. It did not threaten political retaliation, which would have been toothless in any event. It relied solely on the educational suitability of the contra-genocide sources it recommended for consideration.

After the final Guide's presentation to the legislature and a lapse of time, fury erupted among Armenian Americans. As the District Court observed, the appearance of the hated contra-genocide idea ignited "a strong response from the Armenian community and its supporters. They urged then Governor Paul Cellucci to have those references removed from the Guide." The website detractors did not point to a single word or phrase that were said to be false, misleading, or otherwise educationally unsuitable.

## ARGUMENT

### I. THE DISTRICT COURT MISCHARACTERIZED THE CASE AS A STRUGGLE BETWEEN RIVAL POLITICAL CONSTITUENCIES OF RELATIVELY EQUAL POLITICAL CLOUT. BUT THE PLAINTIFF-APPELLANTS' VIEWPOINT WAS INCLUDED IN THE GUIDE BY THE APPROPRIATE OPERATION OF THE ADMINISTRATIVE PROCESS.

The website removals had nothing to do with education, but everything to do with Armenian American political power exerted through politicians to vilify Turkey and Turkish Americans by expunging a reviled idea. The message sent by the Government of Massachusetts to teachers, students, and parents alike was to stay away from the purged websites and the contra-genocide idea like plutonium.

The District Court found nothing constitutionally troubling about politicians and a powerful ethnic-based lobby group usurping the role of educators within the public school system. It speciously maintained that, "Public officials are generally entitled to change their minds about what is recommended or required to be taught in public school classrooms." But that is not what happened. The Board of Education never altered its conviction that the removed websites were educationally suitable and appropriate reference materials for studying the Armenian thesis. It nevertheless purged them from the Guide through electronic "book burning" because the Governor and one or two legislators instructed the Board to do so based on a contrived interpretation of Chapter 276.

The District Court recognized its mischaracterization of the facts, but was undisturbed by the prospect of treating education as politics by other means: "Politics is not a pejorative term in our nation. Properly understood, politics is the essence of democracy…With regard to what will be taught in public school classrooms, we rely on the power of the people to elect, and if they wish, change their representatives as the means to hold them accountable for decisions concerning the content of the curriculum."

The District Court made no reference to famous footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) which should have awakened more judicial skepticism of what had been done to purge the Guide to the disadvantage of Turkish Americans, who constitute a discrete and insular political minority, and to freedom of speech, a cornerstone liberty to facilitate, among other things, repeal of noxious legislation*:*

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin, supra*; on interferences with political organizations, see *Stromberg v. California, supra*, 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lowry*, 301 U.S. 242, and see *Holmes, J., in Gitlow v.*

> *New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U. S. 510, or national, *Meyer v. Nebraska*, 262 U. S. 390; *Bartels v. Iowa*, 262 U. S. 404; *Farrington v. Tokushige*, 273 U. S. 284, or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon, supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare 17 U. S. 428; *South Carolina v. Barnwell Bros.*, at 303 U. S. 177, 303 U. S. 184, n 2, and cases cited.

Neither did the District Court pay heed to Associate Justice Robert Jackson's celebrated opinion in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943): "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." Contrary to Justice Jackson, the District Court insisted that free speech in public schools *should depend on the outcome of elections.*

The District Court counterfactually asserted that, "The facts of this case demonstrate that the plaintiffs and those who share their viewpoint concerning Armenians in the Ottoman Empire are fully capable of participation in the political

process." The facts proved the opposite. Turkish Americans exerted no political clout in alerting Massachusetts educators to educationally suitable and pedagogically sound contra-genocide viewpoints to complement the proponents of the genocide. And once Armenian Americans initiated their lobbying blitzkreig, not a single elected or appointed official in Massachusetts even listened to any alternative point of view. No Turkish American was consulted or asked to respond to what Armenian Americans were advocating. Turkish Americans were politically crushed by the Armenian American juggernaut. There was no due process prior to the electronic "book burning" whatsoever.

The District Court further reasoned, "In the circumstances of this case the decision as to what to teach about the events that the Act and the Curriculum Guide characterize as the Armenian genocide must be made by elected officials, educators, and teachers rather than by federal judges." Plaintiffs, however, were emphatically *not* asking a federal judge to prescribe teaching materials or resources, but only to insure that materials selected by educators for educational reasons were not subsequently purged to suppress a particular political or historical viewpoint because of demands made on state politicians by a powerful political constituency.

The District Court also stressed the deference due state and local educators, the importance of public education to imparting democratic values, and the availability of contra-genocide viewpoints through other means than the Guide in finding no First Amendment violation. But the District Court simultaneously was comfortable with state and local educators being steamrolled by politicians, tacitly condoned public education imparting the non-democratic lesson that disagreeable ideas should be suppressed, not debated, and, permitted speech availability in some forums to justify free speech violations on other forums, i.e., the Guide could suppress free speech outside the classroom if free speech were permitted inside the classroom. The District Court concluded by misstating the facts and the political clout of the Turkish American community and constitutionally blessing the authority of state legislators to hijack public education for political indoctrination and making classroom discussions of history like restricted railroad tickets good for this day and train only depending on the political weather vane.

## II. THE FIRST AMENDMENT PROHIBITS STATE POLITICAL OFFICIALS FROM SUPERSEDING THE DECISIONS OF EDUCATION OFFICIALS ABOUT NON-CLASSROOM INSTRUCTIONAL MATERIALS TO PROPITIATE A POLITICAL CONSTITUENCY.

The Complaint alleged the following First Amendment narrative. Chapter 276 of the Acts of 1998 directed Massachusetts education officials to prepare a Guide to assist in teaching about human rights, and provided topic ideas, including

the Ottoman Armenian controversy and the Irish Potato Famine. Massachusetts educators, following standard administrative procedures for receiving public and apolitical expert input, promulgated a Guide that included, among other things, educationally suitable contrasting viewpoints on websites about the Irish Potato Famine and the Armenian thesis in a resource section comparable to a school library. The Guide then reflected the best educational judgments of Massachusetts state educators.

But then came a political war. Apparently despising the contra-genocide viewpoint of the Ottoman Armenian historical controversy, Armenian Americans vocally lobbied individual Massachusetts legislators and the Governor to direct the electronic "book burning" by the Board of Education of the four supposedly contra-genocide websites that offended them. Craven compliance was forthcoming. The websites were electronically "burned" not because of any educational deficiency, but because Massachusetts politicians intended to deny Plaintiffs access to the contra-genocide viewpoint. That was the obvious message sent by the Board of Education to teachers, parents, and students alike when it capitulated to demands by politicians to remove the Turkish-oriented websites from the Guide. And the natural and predictable impression on the school community made by the Board's electronic "book burning" was that something was sinister about questioning the Armenian thesis.

In glaring contrast, the materials questioning British culpability for the Irish Potato Famine, were never removed from the Guide. Apparently, there was no political furor raised by those defending the viewpoint that British antipathy toward the Irish was the cause of the famine, so the decision of the state's educational experts was left undisturbed.

In *Pico,* the relatively narrow interpretation of the First Amendment as expounded in a dissenting opinion by Justice William H. Rehnquist would have condemned the electronic "book burning" of the contra-genocide websites in this case. And the four-member plurality clearly would have endorsed the viability of Plaintiffs' constitutional claim. Accordingly, *Pico* compels reversal of the District Court.

Writing in dissent for himself, Chief Justice Warren Burger, and Associate Justice Lewis Powell, Justice Rehnquist "cheerfully concede[d]" the statement in Justice William Brennan's plurality opinion: "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt the order violated the constitutional rights of students….The same conclusion surely would apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks

or advocating racial equality or integration. Our Constitution does not permit the official suppression of ideas."

Justice Rehnquist elaborated that his preferred First Amendment standard in lieu of "official suppression of ideas" was a prohibition "of expression of one particular opinion."

That latter standard of the dissenters fits the facts of the present case like a glove. According to Plaintiff-Appellants' allegations and natural inferences drawn from the alleged facts, Defendants removed the websites from the Guide to prohibit the expression of the particular opinion that the tragic experience of Armenians in the Ottoman Empire during the World War I era did not amount to the crime of genocide.

It is no answer that the Board of Education did not proscribe expression of the contra-genocide idea in private bookstores or public libraries. The Supreme Court has never held that honoring free speech in one forum justifies suppressing freedom of expression in another. If that were the law, the decision in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) would have been against the student wearing the armband protesting the Vietnam War in the classroom because he still could have worn it strolling on the public sidewalks or in public parks; and, the student was not prohibited from making oral statements against the War to

classmates or teachers. Further, Justice Rehnquist's "prohibition of the expression of one particular opinion" standard made no exception for cases where the prohibited idea could be expressed elsewhere, for example, in a neighboring city.

Neither did Justice Rehnquist's dissent carve an exception for prohibiting expression of a particular opinion in the classroom. Consider a variation of the Scopes trial in a modern setting. Suppose the Massachusetts Board of Education had removed from every classroom textbook Darwin's idea of evolution; and, prohibited oral expressions of the idea by teachers and students alike. The reason for the prohibition was to appease a citizens' group worried that Darwin's idea would corrupt public morals. The prohibition of the particular idea would violate the First Amendment standard of Justice Rehnquist's dissent even if it reached into the classroom. Justice Brennan's broader "official suppression of ideas" standard for the plurality in *Pico, a fortiori*, would condemn the Scopes hypothetical along with what the Massachusetts Board of Education did in this case to purge the Guide of the contra-genocide thesis.

In sum, both Justice Brennan's plurality and Justice Rehnquist's dissent in *Pico* clearly sustain the viability of Plaintiff-Appellants' First Amendment claim.

If this Court finds a First Amendment violation based on these troublesome facts, the result would delight educators. It would provide them a shield against

the political hijacking of educational matters by state educators without injecting federal courts into second-guessing their educational decisions. Moreover, this case addresses only the unusual situation in which educators are forced by politicians to reverse course after accrediting an idea as educationally and pedagogically suitable. (Non-selection of books or websites with the intent of suppressing a particular idea is not at issue). In removal circumstances, the political or partisan motive for the purge is self-evident, akin to *res ipsa loquitur* in the law of torts. Fact-finding to determine the intent or purpose behind the removals would not be problematic, we believe, and, once this case returned to the District Court, discovery should be quick and straightforward. In addition, "book burning" inflicts greater free speech harm that does non-selection of a book or website for public school use or reference material for unstated political or partisan reasons. Book burning is a stigmatizing act that inherently conveys a government message of disapproval of the idea expunged no matter where it is encountered. Non-selection does not send that censorship message because it is invisible and can be explained for numerous non-disparaging reasons, for instance, lack of money or the need to accommodate equally educationally worthy materials.

## III. TURKISH AMERICANS IN MASSACHUSETTS ARE A DISCRETE AND INSULAR MINORITY COMMANDING HEIGHTENED CONSTITUTIONAL PROTECTION UNDER THE CONSTITUTION BECAUSE OF A HISTORY OF VICTIMIZATION, INTIMIDATION, AND POLITICAL POWERLESSNESS WHEN CONFRONTING ARMENIAN AMERICANS AND THEIR POLITICAL PROXIES.

Turkish Americans in Massachusetts satisfy the standards of a discrete and insular minority deserving heightened constitutional protection under footnote 4 of *Caroline Products.* As chronicled, supra, Turkish Americans have been chronic victims of violence perpetrated by Armenian Americans—often with impunity. In this case, Turkish Americans were politically pummeled by one or two Massachusetts legislators and executive branch officials in response to angry demands of Armenian Americans. A comparative social and political profile between Turkish Americans and Armenian Americans in Massachusetts exposes the absurdity of the District Court's fatuous *ipse dixit* that Turkish Americans should win elections to remedy their constitutional grievances.[4]

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[4] In additional to those attributes discussed above, the Armenian American community enjoys vastly superior political assets compared to the Turkish American community in Massachusetts.

A. A major Armenian language newspaper is published in Massachusetts: *Hairenik*: Based in Watertown, Massachusetts, also called Armenian Weekly. http://www.hairenik.com/weekly/

There are no Turkish language or Turkish-American oriented newspapers in Massachusetts.

B. Massachusetts hosts numerous Armenian oriented academic programs: (i) National Association for Armenian Studies and Research, (ii) University of

Massachusetts at Boston – Armenian Studies Program, (iii) University of Massachusetts at Amherst – Armenian Studies Program, (iv) Boston University - Elisabeth M. Kenosian Chair in Modern Armenian History and Literature, and (v) Clark University, Worcester, Massachusetts - Endowed Chair in Modern Armenian History and Armenian Genocide Studies. Massachusetts is also home to the Armenian Library and Museum of America, in Watertown.

There are no research centers or university programs on Turkish Studies in Massachusetts.

C. Cambridge, Massachusetts is, since 1986, a Sister City to Yerevan, Armenia. On September 11, 1990, the Mayor of Yerevan Armenia was honored by the Mayor of Boston. See, Armenian Mayor Honored in Boston, Boston Globe, Sept. 12, 1990.

There are no Sister Cities between any Massachusetts and Turkish cities.

D. The Rose Fitzgerald Kennedy Greenway, originally designed as a park without memorials and which does not even include a bust of its namesake, contains a monument to Armenians, part of an Armenian Heritage Park, the sole group or person mentioned at the park other than Rose Fitzgerald Kennedy.

There are no Turkish-American oriented museums or monuments in Massachusetts.

E. In March of this year the Massachusetts State House exhibited, "portraits of Armenian Genocide survivors with their oral histories." See, http://www.anca.org/press_releases/press_releases.php?prid=1675.

There have been no events in the Massachusetts State House relating to Turkish Americans.

F. No Place for Hate is, according to the Anti-Defamation League, "A network of communities throughout New England working towards creating inclusive environments…" Pressured by activists, the ADL released a "Statement on the Armenian Genocide" on August 21, 2007, which read in pertinent part, "The consequences of those actions were indeed tantamount to genocide." According to a group called, "No Place For Denial," the statement, "was not a full, unequivocal acknowledgement of the Armenian Genocide." Therefore, the group, in coordination with the Armenian National Committee for Eastern Massachusetts, waged a campaign to cause Massachusetts towns and organizations to resign from the ADL program. See, http://www.noplacefordenial.com/ and http://npfdnews.blogspot.com/2007/10/ancem-press-releases.html. On this basis,

In sum, the District Court's admonition to Turkish Americans in Massachusetts to remedy their constitutional free speech quarrels by winning elections is reminiscent of Associate Justice Henry Brown's assertion to African Americans in the odious decision of *Plessy v. Ferguson*, 163 U.S. 537 (1896) postulating that they would probably soon regain control of the Louisiana state legislature despite the flourishing of the Ku Klux Klan and enact their own "separate-but-equal" rail passenger laws. Contrary to the District Court, Turkish Americans in Massachusetts are a discrete and insular minority who lack the political organization and clout to protect them from government overreaching, subjugation, or discrimination. Accordingly, heightened rather than relaxed judicial scrutiny should be applied in testing the constitutionality of the politically-motivated removal of the websites in the Guide at issue in this case. The ballot box remedy held out by the District Court is like a "munificent bequest in a pauper's will," to borrow from Justice Jackson's concurring opinion in *Edwards v. California*, 314 U.S. 160 (1941).

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eleven municipalities and several state organizations have withdrawn from the program.

## IV. CHAPTER 276 SHOULD BE INTERPRETED TO PERMIT MASSACHUSETTS EDUCATORS TO PRESENT MULTIPLE VIEWPOINTS ON THE OTTOMAN ARMENIAN HISTORICAL CONTROVERSY TO AVOID FEDERAL PREEMPTION BASED ON THE EXCLUSIVE POWER OF THE UNITED STATES GOVERNMENT OVER FOREIGN POLICY.

In *Movsesian, et al v. Victoria Versicherung AG, et al*, 578 F.3d 1052, 9th Circuit, 2009, a panel of the United States Court of Appeals for the Ninth Circuit[5] ruled that state laws officially recognizing or affirming the Armenian genocide thesis are constitutionally preempted by the express foreign policy of the United States to prohibit such legislation.

The panel surveyed a long history of presidential-congressional dialogue regarding the Armenian thesis, and concluded that, "there is an express federal policy prohibiting legislative recognition of an 'Armenian Genocide'" that state legislatures may not flout or contradict. That federal policy has been strengthened since the panel ruling by, among other things, President Barack Obama's support for the October 10, 2009 Protocol between Turkey and Armenia that would, among other things, establish an historical commission to examine the shared history of Turks and Armenians, especially the genocide thesis; the continuing refusal of Congress to affirm the thesis by resolution or other legislation; and, President Obama's refusal to do the same in presidential proclamations, statements, or addresses.

[5] A petition for rehearing *en banc* has been filled.

Thus, if Chapter 276 were interpreted to constitute a legislative recognition of the "Armenian Genocide" by prohibiting its contradiction in the Guide, as it was apparently by the Massachusetts Commissioner of Education, then the statute as applied by the Board of Education would be preempted by the exclusive federal power over foreign policy by dint of the *Movsesian* precedent. To avoid that constitutional collision, Chapter 276 should be interpreted as leaving undiminished the customary discretion of educators to teach human rights or other topics in accord with professionally recognized educational and pedagogical standards that emphasize conflicting viewpoints and independent thinking. Statutes should be interpreted where plausible to avoid, not invite, knotty constitutional questions. See e.g., *Zadvydas v. Davis,* 533 U.S. 678 (2001). With that interpretation, the Board of Education would be free to reexamine the Guide's treatment of the Ottoman Armenian tragedy informed exclusively by educational or pedagogical considerations and to reinstate the removed websites accordingly.

## CONCLUSION

For the reasons set forth above, the District Court's order dismissing Plaintiffs' complaint for failure to state a claim should be reversed because of the *Pico* precedent and the doctrine of constitutional avoidance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bruce Fein, hereby certify that a true copy of the foregoing document was served, by United States mail, on October 15, 2009, upon (1) William W. Porter, Esq., Counsel for Defendants, Office of the Massachusetts Attorney General, One Ashburton Place, Room 2019, Boston, MA 02108 .

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CERTIFICATE OF LENGTH AND TYPEFACE

The accompanying brief complies with the length and typeface limitations of this Court because it was prepared in a proportionally spaced typeface in 14-point Times New Roman typeface, and contains 6,663 words according to the word count of the word processing system used to prepare it.

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