

IN BRIEF

NEWSLETTER | SPRING 2024



PIONEER
PUBLIC INTEREST
LAW CENTER



*The Honorable Frank J. Bailey
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President's Message

As we approach our second anniversary this June, we look ahead to an ever more challenging environment for our three principal areas of focus: school choice, government transparency, and economic and participatory opportunity free from unreasonable government interference. Public education continues to fail our children. Illegal teacher strikes in Massachusetts have left vulnerable students with deficits that likely will not be recovered. Children participating in the METCO program, as well as those at charter and religious schools in Boston are ineligible to participate in the city's laudable, but flawed, "BPS Sundays" program. Students at religious schools remain ineligible for the taxpayer-funded John and Abigail Adams Scholarships to attend Massachusetts state colleges and universities. In 2024, we continue to battle for education equity and fairness. Thank you for your support this year!

An Investment in Outcomes

This comment really struck me during a recent conversation with one of the early investors in the Law Center. A longstanding Massachusetts resident and philanthropist, he has grown increasingly concerned about the choices being made that are limiting access and opportunity for students, families, and citizens across the Commonwealth. He views his support of the Law Center as "an investment in outcomes" as Judge Bailey and his team continue to obtain important victories in the defense of individual freedoms. The support from donors like him make it all possible.

As we look to stem the tide against exclusionary programs and unconstitutional policies, we hope you take pride in knowing your investment drives meaningful outcomes.

To learn more, contact Andrew Horgan, Chief Development Officer
ahorgan@pioneerinstitute.org or 857.990.9036

Success Stories

MIAA changes course on prohibiting virtual school students from playing sports on their home town teams

The Law Center scored a victory for school choice against the Massachusetts Interscholastic Athletic Association (MIAA), which governs school sports in Massachusetts. Prior to May 2022, the MIAA changed its policy and effectively banned children who attend virtual public schools from participating on the sports teams in their hometowns. Virtual schools are public schools in Massachusetts. After litigating for a year, the MIAA relented on the new policy and agreed to allow kids to go back on the fields, courts and rinks to compete with their friends and represent their hometowns. Among virtual school students are those who suffered anxiety issues after bullying, are recovering from serious health issues, or are talented actors or musicians who cannot accommodate a regular in-person schedule

Brookline schools provide records regarding election violations after the Law Center petitions for enforcement of Massachusetts Public Records Law

Brookline public school officials were fined for using municipal resources to solicit votes from parents in support of a tax limit override on the town's ballot in a recent election. In fact, according to *The Boston Globe*, they "tucked" the solicitation, which threatened school budget cuts, increased class size, and fewer electives, in with innocuous newsletters sent by school personnel at taxpayer expense. Pioneer Institute is further investigating the extent of the violation and requested that the Law Center submit a records request to the Town of Brookline seeking records related to text messages or emails from or to Superintendent of Public Schools Guillory, Deputy Superintendent Givens, members of the Brookline School Committee and the Office of Campaign and Political Finance (OCPF).

Brookline failed to respond to the PRR in a timely manner, and we were forced to file an appeal with the records supervisor at the

Secretary of State's office. Following the filing of that appeal, Brookline produced certain responsive documents, which we are currently reviewing.

Springfield family protects generational investment in family home as city backs off taking equity following commencement of action to declare state statute unconstitutional

Ashley Mills, a 25-year-old, a single mother and U.S. Postal Service employee who suffers from a serious hearing deficit, inherited her family home in Springfield, Massachusetts from her grandfather. When she inherited the home, there were tax arrearages that her family had a difficult time curing despite several opportunities provided by the city.

When we met Ashley, she was facing a hearing at which the City of Springfield was about to foreclose on her right to redeem the home even though only about \$20,000 in taxes was due and the home was worth over \$250,000. The concern was that if the city took the home under existing law, it had no requirement, and perhaps no ability, to pay Ashley the value of the property in excess of the tax arrearage. Given that the Massachusetts legislature has not amended the tax lien statute to bring it in line with a recent U.S. Supreme Court case on point and no state court has addressed the constitutionality of the tax lien statute, Pioneer Law Center, Greater Boston Legal Services and Morgan Lewis brought a unique action directly in the state Supreme Judicial Court seeking a ruling on the viability of the tax lien law.

On March 19, 2024, under the pressure of a hearing that day, the City of Springfield withdrew its motion to foreclose on Ashley's interest in the family home. This development removes any immediate threat that Ashley will lose her home, but keeps in play our efforts to invalidate what the Massachusetts SJC has called an "archaic and arcane law."

Speaking Engagements

- In February, Frank Bailey presented an update on the Law Center's work, especially in the education equity area, to a group of Pioneer Institute supporters and their friends and relatives at sessions in Naples, Florida.
- Frank Bailey and Jamie Gass (Pioneer's director of school reform) discussed education choice cases at a lunch program for interested attendees on March 5, 2024.
- Frank Bailey represented the Law Center at an open house for law students in March. Students had a chance to learn about public interest litigation and the opportunity to work as an intern for Pioneer Law Center.

Thank you to our co-counsel and partners

KING & SPALDING



McDermott
Will & Emery

Morgan Lewis



SIDLEY

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WILMERHALE



Current Cases

Pioneer Law Center files brief seeking dismissal of class action “money grabs” under fanciful use of state wiretap statute



There are currently at least 24 class action lawsuits pending in Massachusetts state and federal courts claiming that owners of public websites have violated the Massachusetts Wiretap Act — a 1968 criminal statute that includes a private civil cause of action for certain persons “aggrieved” by violations. These lawsuits focus on the use of common user tracking technologies (“adtech”), such as Google Analytics, Meta/Facebook Pixel, and similar solutions used for analytics and marketing purposes. Of the known lawsuits currently pending, at least 15 were brought against Massachusetts hospitals. These lawsuits are part of a wave of hundreds (maybe thousands) of such cases across the country. Plaintiffs claim that each time a website (or mobile application) uses adtech that captured any information about a user’s actual identity, or even computer or mobile device, along with the user’s browsing activity and that information is shared with any third party (e.g., Google, Meta) without sufficient advance warning to the user, a Wiretap Act violation has occurred—entitling the user to statutory damages. Mass General Brigham settled just such a case for \$18.4 million in 2022. In that settlement, class members received \$100 or less and the lawyers received \$4.2 million in legal fees.

These lawsuits are manufactured “money grabs” by plaintiffs’ class action law firms, with no evidence of any actual harm to users. They seek to apply the Wiretap Act in a way that the legislature could not possibly have intended (or even imagined) when the statute was overhauled in 1968. Never in the 50+-year history of the Wiretap Act has it successfully been used to create widespread liability for legitimate organizations—until the Partners Healthcare settlement last year, which spawned this wave of copycat lawsuits.

The adtech tools at issue are commonplace in 2024 for all types of organizations, across for- and non-profit sectors. Very few organizations’ websites *currently* feature disclosures that would satisfy the standard plaintiffs’ lawyers are now espousing—to say nothing

of disclosure practices looking back at least three years (the applicable statute of limitations). As a result, unless Massachusetts courts ultimately reject plaintiffs’ basic legal position, nearly every website/mobile application owner in the Commonwealth faces significant exposure.

The amicus brief the Law Center filed in this case, prepared on our behalf by the outstanding appellate team at Wilmer Hale, focused on the widespread and significant adverse consequences for all nonprofit and for-profit businesses that rely on standard website analytics in the ordinary course of their operations. Moreover, the Massachusetts legislature clearly never intended the wiretap statute to apply to internet websites, which had not even been invented in the 1960’s. It is not for the courts to rewrite those statutes to apply them to the twenty-first century, which is what the class action lawyers would have them do. It is up to the legislature to weigh the economic, social and political considerations of applying the wiretap statute to browsing the Internet.

Pioneer Law Center joins the fight against illegal teachers’ union strikes that injure the most vulnerable children and set all students back

In a well-publicized two-week strike, Newton, Massachusetts public school teachers walked out on the students they had agreed to teach under their existing contract. The Law Center immediately began to hear from Newton parents whose children were left waiting for buses that never came to take them to school. The most vulnerable children, those with learning disabilities that ranged from minor to debilitating, were most affected by the loss of school. Experts say those children may never get back to where they should have been. Students who were counting on after-school activities, sports, and social interaction with peers were also set back. Games that were scheduled were never played. Practices that would have advanced their skills were cancelled. Not to mention the family disruption that occurred in countless Newton homes as parents had to change schedules to accommodate childcare responsibilities.



Teachers were ordered to return to the classroom by a Superior Court Judge, an order that they ignored even after heavy fines were imposed. The Newton strike followed teacher strikes in Woburn, Andover, Brookline, Malden, and Haverhill.

Massachusetts Teachers Association President Max Page told the State House News Service in 2023 that unlawful teacher strikes are “worth it” because the concessions gained in long term benefits are substantial (C. Lininski, Teachers Finding Illegal Strikes are “Worth It” SHNS, 2/6/2023). There are reasons why certain public sector employees – teachers, police, and firefighters – are not permitted to strike. As noted, during strikes students may have profound learning loss and parents may have to choose between a paycheck and child safety. Page and his members should remember that an illegal strike is never “worth it” to the children they have been entrusted to educate. For that reason, only 13 states permit public school teachers to strike.

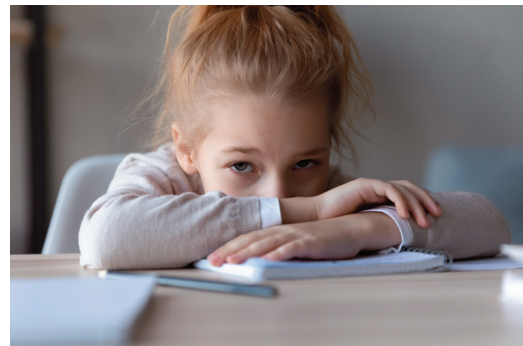
The Law Center sent lawyers to the court hearings. We are working to ensure that the cost of an illegal strike rises to the point that Max Page can no longer blithely state that such walkouts are “worth it.”

Pioneer Law Center continues a unique challenge to the constitutionality of the Massachusetts Tax Lien statutory scheme

Although the City of Springfield has withdrawn its immediate request for entry of a foreclosure judgment (see above), litigation continues in Massachusetts state courts. In an unusual direct action to the Supreme Judicial Court, the Law Center, together with our co-counsel from Greater Boston Legal Services and Morgan Lewis, are seeking an order invalidating the use of a Massachusetts tax law that permits a city to take not only what is due in delinquent taxes, but all the taxpayer’s hard-earned equity. The U.S. Supreme Court

recently deemed a substantially similar statute unconstitutional in *Tyler v. Hennepin County, Minnesota*. Still, many Massachusetts cities and towns continue to deprive citizens of the equity in their homes in direct violation of the Fifth and Fourteenth Amendment’s requirement that the government not take a citizen’s property without “just compensation.” If we are successful, the Superior Court and, eventually, the SJC will apply the *Tyler* case to end this deprivation of generational wealth and prompt much needed action by the General Court.

Preparing the challenge to Boston Public Schools decision to exclude certain children from museum pass program



Boston Public Schools has initiated a laudable “BPS Sundays” program that allows students and their family members entry to major Boston area museums and attractions for free. Included are the Boston Aquarium, the Boston Museum of Fine Arts, the Boston Children’s Museum, the Boston Science Museum and other attractions. Entry on a weekend would cost a family of four as much as \$120, which is prohibitive for many families. Sadly, BPS has excluded METCO, charter school and religious school students from participation. In order to better understand BPS and Boston’s

Recent and Upcoming Pioneer Law Center Events



Reasonable Minds Can Differ: the 2023-2024 U.S. Supreme Court Term. On February 15, 2024, Constitutional Law Professors Jessica Silbey and Gary Lawson, both from the Boston University School of Law, provided their analysis of major cases before the SCOTUS this term. The discussion explored the impact of cases, such as the power of a state to decline to permit a candidate on a ballot if the candidate had allegedly participated in an insurrection; the right of an investor to insist on a trial before a federal Article III judge rather than an SEC administrative law judge; and a state’s authority under the First Amendment to prohibit social media websites from “deplatforming” a participant, or moderating the participant’s

statements, if the social media company disagrees with the participant’s messages. The event was well attended and well received.

Upcoming: The Inaugural Brackett B. Denniston, III Program on Law and Democracy.

On September 26, 2024, the Pioneer Law Center will host the first in a series of annual programs dedicated to an in-depth discussion of critical issues challenging the rule of law in America. This dinner event will feature Paul D. Clement, 43rd U.S. Solicitor General, as the keynote speaker. Mr. Clement, who has argued over 100 cases at the Supreme Court, will address the First Amendment implications for speech on our college campuses.

reasons for excluding these families, the Law Center has sent a public records request to those entities. Boston continues to drag its feet in responding to PPILC's records request and the center anticipates that we may need to commence an action in Superior Court. After we receive the records, we will plan further steps to ensure that all students in the city are able to participate in this important program.

Supreme Court holds argument on case challenging the Dodd-Frank Act's heavy-handed denial of fundamental rights to those charged with securities violations



As noted in our Fall edition, Pioneer Law Center, together with King & Spaulding, LLC, has filed an amicus brief with the Supreme Court in support of an investor who was denied access to the courts. People in the investment industry should be entitled to adjudicate claims against them before a federal judge appointed by the president and with lifetime tenure. Under current law, the SEC can limit those charged with fraud to a hearing before an SEC administrative law judge. Allowing the SEC to adjudicate its own prosecutions violates constitutional requirements. To begin with, the SEC is quite literally on the same side as the prosecution. Worst of all, the administrative law judge overseeing the case is employed by the SEC. This creates an actual and apparent conflict of interest. These aspects of the Dodd-Frank Act should be stricken and the constitutional rights of those charged with fraud should be restored.

On November 29, 2023, the Court held arguments on the case. Afterward, *The New York Times* observed that justices on both sides of the political spectrum appeared wary of any law that denied people access to the federal courts and required adjudication of claims worth millions before the very agency that is charged with policing the investment community. A ruling is expected no later than June.

The fight to make taxpayer-funded college scholarships available to ALL students in Massachusetts

The John and Abigail Adams Scholarships provide up to eight semesters of tuition credit at a state college or university. For this scholarship, merit is based on student scores on the 10th grade Massachusetts Comprehensive Assessment System (MCAS) test. But children that attend school at a Catholic, Jewish, or other religious school are ineligible to take the MCAS examination excluding them from participation in the scholarship program. We feel strongly that application of the anti-aid amendment in the state constitution in such a manner violates the U.S. Constitution. We also believe this application violates the words of the state anti-aid amendment itself. Article XVIII of the Massachusetts Constitution concludes with this exception: *“Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.”*

Violence in our public schools is rampant and Pioneer Law Center sues to require the Boston schools to reveal the numbers

We represent a journalist who is investigating allegations of sexual misconduct, bullying, bias, discrimination and other misconduct perpetrated on students by both school employees and other students. On his behalf, we are seeking access to 457 reports entitled “Summary of the Investigation Into Allegation(s) (Investigative Summaries) prepared by the BPS’s Office of Equity. Pioneer Law Center commenced an action for injunctive and declaratory relief pursuant to the Massachusetts Public Record Law, G.L. c. 66, §§ 10 and 10A, and the Massachusetts Declaratory Judgment Act, G.L. 231A, § 1. We are awaiting a ruling following a hearing in the late fall of 2023 and expect a ruling at any time. It is vital for the public to fully understand the extent and reactions to school violence after the pandemic.

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Meet the Interns:

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Getting to work at Pioneer Public Interest Law Center has allowed me to take what I have learned in a classroom setting and apply it to real-world cases and projects. It has also given me the opportunity to work with skilled attorneys who genuinely want to see my legal skills grow, and who are always willing to take the time to give invaluable advice and guidance.

Maia Katsnelson

Brandeis University



My time at Pioneer Public Interest Law Center has been an eye-opening experience. Working with Judge Bailey and John Laliberte I learned a tremendous amount about legal research and thinking. The opportunity to witness courtroom presentation was exciting and invaluable.



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Pioneer Law Center's challenge to the Massachusetts Anti-Aid Amendment back on track

This case involves the so-called Blaine Amendment to the Massachusetts Constitution, which prohibits the state from providing financial support to private or religious schools. The amendment came out of the administration of Know-Nothing Party Governor Henry Gardner at the constitutional convention of 1853. The amendments were designed to deny government aid to parochial schools, especially those operated by the Catholic Church in locations with large immigrant populations. These prohibitions were principally directed at Irish Catholic newcomers to the state. In recent cases such as *Espinosa* and *Carson*, the U.S. Supreme Court has ruled under the First Amendment's Free Exercise Clause that the state cannot discriminate against school children simply because they attend a religious school.

The Commonwealth of Massachusetts has refused to support children with learning disabilities solely because they attend a religious school. We are preparing, along with partners from like-minded legal advocacy groups, to challenge the application of the Blaine Amendment in this antiquated and discriminatory manner. Our efforts to identify families willing to undertake such a case has been difficult for understandable reasons. We believe the search is at an end and expect to initiate the litigation soon.

Pioneer Law Center closes in on filing action to enforce state law requiring teaching and testing of civics.

As previously reported, Pioneer Law Center has completed work on a complaint against the education leaders in Massachusetts to enforce the Education Reform Act of 1993 (Education Act). The Act imposes obligations on the state "to develop academic standards, and 'curriculum frameworks; for attaining those standards in certain 'core subjects': mathematics, science and technology, *history and social science*, English language arts, foreign languages, and the arts." We emphasize that the Education Act specifically requires that every senior attain competency in, among other subjects, history and social science. In addition, the Act sets forth specific minimum requirements and objectives for curriculum standards in history and social science to be taught in public schools, which include instruction in at least the major principles of the Declaration of Independence, the United States Constitution, and the Federalist Papers. These requirements have not been achieved despite the decades that have passed, and we can all see the fallout from that failure. We are working on "court standing" issues and hope to launch this case in the near future.

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