

IN THE SUPREME COURT OF MISSOURI

No. SC88075

SAINT LOUIS UNIVERSITY, ET AL.,

Plaintiffs-Respondents,

v.

THE MASONIC TEMPLE ASSOCIATION OF ST. LOUIS, ET AL.,

Defendants-Appellants.

On Transfer from the Court of Appeals

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI IN SUPPORT OF
DEFENDANTS-APPELLANTS AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF JURISDICTION AND STATEMENT OF
FACTS.....1

STATEMENT OF INTERESTS OF AMICUS CURIAE.....1

SUMMARY OF
ARGUMENT.....2

ARGUMENT.....3

1. Missouri’s Constitution Requires a Strict Separation of Church and State,
Particularly in the Area of Education.....3

2. Failing to Properly Construe the Missouri Constitution, Courts Below
Erroneously Construed its Religious
Provisions.....10

A. The Appellate Court Erroneously Concluded that This Court’s Cases
Applying Article IX, Section 8 of the Missouri Constitution Were
Inappropriate.....1

0

B. All the Facts Tending to Show Whether Saint Louis University is
Controlled by a Religious Creed Must be Considered Before
Summary Judgment Can be

Granted.....1

3

CONCLUSION.....1

9

TABLE OF AUTHORITIES

Cases

<i>Americans United v. Rogers</i> , 538 S.W.2d 711, 720 (Mo. 1976) (en banc).....	10
<i>Berghorn v. Reorganized School Dist. No. 8</i> , 364 Mo. 121, 260 S.W.2d 573 (1953)	11,
	12
<i>Board of Ed. of Central School Dist. No. 1 v. Allen</i> , 392 U.S. 236 (1968).....	5
<i>Cooper v. Finke</i> , 376 S.W.2d 225, 229 (Mo. 1964).....	18
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1, 17 (1947).....	5
<i>Harfst v. Hoegen</i> , 349 Mo. 808, 163 S.W.2d 609 (Mo. 1942) (en banc).....	5, 7,
	11
<i>ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.</i> , 854 S.W.2d 371, 376 (Mo. 1993) (en banc).....	17,
	18
<i>Locke v. Davey</i> , 540 U.S. 712, 722 (2004).....	6,
	7
<i>McVey v. Hawkins</i> , 364 Mo. 44, 258 S.W.2d 927 (Mo. 1953).....	5

Oliver v. State Tax Commission of Missouri, 37 S.W.3d 243, 251 (Mo. 2001)

(en

banc).....4

Olson v. Auto Owners Ins. Co., 700 S.W.2d 882, 884 (Mo. App.

1985).....18

Paster v. Tussey, 512 S.W.2d 97 (Mo.

1974).....5

Van Orden v. Perry, 545 U.S. 677 (2005) (Breyer, J.

concurring).....18

Wheeler v. Barrera, 417 U.S. 402

(1974).....7

Constitutional Provision

MO. CONST., Art. IX, § 8.....4

Other Authorities

Charles Blackmar, *The Constitution and Religion*, 32 ST. LOUIS U. L.J. 599, 600-1

(1988).....8

R. FREEMAN BUTTS, *THE AMERICAN TRADITION IN RELIGION AND EDUCATION*

15-17, 19-20, 26-37 (1950).....6

Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 587 (2003).....5

NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT 15 (2005).....4

Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 131-32 n. 77 (2000).....8

John C. Jefferies, Jr., and James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 305 (2001).....8

FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 188 (2003).....6

James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 65, 68, 67 S.Ct. 504, 91 L.Ed. 711 (1947).....7

Saint Louis University – Mission & Ministry for Faculty & Staff, <http://www.slu.edu/x2411.xml> (last visited Nov. 3, 2006).....16

Saint Louis University, <http://www.slu.edu/x260.xml> (last visited Nov. 3, 2006).....14,
15

Saint Louis University –Mission Statement, <http://www.slu.edu/x5021.xml>
(last visited Nov. 3, 2006).....15

Saint Louis University – About SLU, <http://www.slu.edu/x5029.xml>
(last visited Nov. 3, 2006).....15

Saint Louis University – Student Life, <http://www.slu.edu/x841.xml>
(last visited Nov. 3, 2006).....15

Saint Louis University – Jesuit Mission, <http://www.slu.edu/x844.xml>
(last visited Nov. 3, 2006).....15

STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

This friend of the court brief adopts that jurisdictional statement and statement of facts as set forth in Appellant's brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 600,000 members dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Eastern Missouri is an affiliate of the ACLU with over 4,800 members in Eastern Missouri. As part of its mission, the ACLU of Eastern Missouri has participated, either as counsel or as *amicus*, in numerous cases supporting Constitutional rights, including the religious liberty made possible by the separation of church and state. On behalf of its members, the ACLU of Eastern Missouri files this brief to highlight the significant church-state separation mandates contained in the Missouri Constitution and demonstrate that such provisions protect religious liberty by prohibiting coercive taxation for the promotion of a particular religion.

The ACLU of Eastern Missouri files this *amicus* brief in support of a strict interpretation of the Missouri Constitution's prohibition of the use of public resources for the promotion of a particular religion. Religious liberty is at its foremost where the government cannot require taxpayers to fund a religious university.

SUMMARY OF ARGUMENT

The State of Missouri rigorously protects its citizens' religious liberty by requiring a strict separation of church and state, particularly in the area of education. The plain language of the Missouri Constitution prohibits the expenditure of public resources for religious educational institutions, including universities. This prohibition has been repeatedly interpreted by Missouri courts to be stricter than what is required by the Establishment Clause. The text and history of Missouri's constitution mandates maintenance of a proper distance between church and state.

This case involves the granting of public funds to Saint Louis University. There are significant reasons to believe that Saint Louis University is a religious university, despite its claim to the contrary. The lower courts improperly and summarily concluded otherwise by looking at the make up of the University's board in isolation and in a light most favorable to the University's position. This Court's precedents, however, require a court to consider all the facts and circumstances in order to determine the sectarian or secular nature of an educational institution. There are numerous facts that should have been considered and that tend to show that Saint Louis University is indeed a sectarian institution. By looking at one aspect of Saint Louis University in the light most favorable to Saint Louis University and ignoring the many contrary inferences, the lower courts have inappropriately deprived appellants of their day in court on a matter of public importance.

ARGUMENT

1. Missouri's Constitution Requires a Strict Separation of Church and State, Particularly in the Area of Education

In considering the issues raised in this case, the courts below failed to properly construct and respect the separation of church and state embodied in the Missouri Constitution. A review of the text and history of the religion provision at issue is a necessary aid to determining their application to the facts of this case.

The Missouri Constitution explicitly and unequivocally prohibits taxation or the expenditure of public resources in aid of religious institutions. Article IX, section 8 of Missouri's Constitution provides:

Prohibition of public aid for religious purposes and institutions. -- Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever;

nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

MO. CONST., Art. IX, § 8.

As this Court has recognized, our constitution deals with the separation of church and state with greater particularity than the United States Constitution. *Oliver v. State Tax Commission of Missouri*, 37 S.W.3d 243, 251 (Mo. 2001) (en banc).

The plain language of the article IX, section 8, protects religious liberty by prohibiting coercive taxation for the promotion of a particular religion. It goes to the heart of the reason for separating church and state “to prevent churches and other religious organizations from entering into the fight for public resources, where taxes would go to support religion.” NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT* 15 (2005). This Court has acknowledged this purpose and the consequences of departing from the Constitution’s proscription and utilizing public resources to aid a private university controlled by a religious creed, church, or sectarian denomination:

The constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may

not be used for the help of any religious sect in education or otherwise. ... Our schools would soon become the centers of local political battles which would be dangerous to the peace of society where there must be equal religious rights to all and special religious privileges to none. The faithful observance of our constitutional provisions happily makes such a condition impossible.

Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (Mo. 1942) (en banc).

Not only is the separation of church and state mandated by Missouri's Constitution stricter than that required by the United States Constitution, it is amongst the strictest in the country. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 587 (2003). As a result, this Court has often found a violation of the Missouri Constitution under circumstances where a violation of the First Amendment's Establishment Clause would not be found. For example, while a state might choose to provide textbooks for students in parochial schools without offending the Establishment Clause (*Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968)), such expenditure would violate the Missouri Constitution. *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974). Likewise, the use of public resources to transport children to a religious school may be acceptable under the Establishment Clause (*Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947)), but the same activity is prohibited by the Missouri Constitution.

McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (Mo. 1953).¹

The Supreme Court of the United States has recognized that the states have an interest in preventing tax money from supporting religion and may impose a stronger wall of separation than the First Amendment requires at a minimum. Discussing the State of Washington's no-aid amendment to its constitution, Chief Justice Rehnquist recognized that while the state "draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel." *Locke v. Davey*, 540 U.S. 712, 722 (2004). His majority opinion went on to note:

In fact, we can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion. See R. FREEMAN BUTTS, *THE AMERICAN TRADITION IN RELIGION AND EDUCATION* 15-17, 19-20, 26-37 (1950); FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 188 (2003) ("In defending their religious liberty against overreaching clergy, Americans in all regions found that Radical Whig ideas best framed their argument that state-supported clergy undermined liberty of

¹ Saint Louis University's assertion below that a secular purpose saves the provisions of taxpayer money at issue is wholly irrelevant to analysis under the Missouri Constitution.

conscience and should be opposed"); *see also* James Madison, Memorial and Remonstrance Against Religious Assessments, *reprinted in Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 65, 68, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (appendix to dissent of Rutledge, J.) (noting the dangers to civil liberties from supporting clergy with public funds).

Id., 540 U.S. at 722-23 (footnote excluded). *See also Wheeler v. Barrera*, 417 U.S. 402 (1974) (recognizing that Missouri's constitutional requirements regarding the separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution).

Like the provision of the Washington Constitution at issue in *Locke v. Davey*, Missouri's Constitution diverges from Establishment Clause analysis when it comes to the spending of tax dollars generally and, in particular, when it comes to supporting religious educational institutions with tax money. This Court long ago recognized that while "Missouri follows generally the usual pattern of religious guaranties and safeguards in its Constitution, . . . [i]t forbids . . . payments from any public funds to sustain any private or public school controlled by any sectarian denomination." *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (Mo. 1942) (en banc). "[W]e have an explicit interdiction of the use of public money for a teacher of religion . . ." *Id.*, 163 S.W.2d at 613.

The history of religious provisions to the Missouri Constitution corroborates this Court's understanding of their intent. The detailed provisions were known as the "Blaine

Amendment.” Charles Blackmar, *The Constitution and Religion*, 32 ST. LOUIS U. L.J. 599, 600-1 (1988). The primary purpose of Blaine Amendments was to bar the use of public funds to support religious schools.

Blaine Amendments were a response to several states providing public funding for Catholic schools. In his 1875 State of the Union Address, President Grant called for an amendment to the United States Constitution that would expressly forbid the use of public funds to support religious institutions. See Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 131-32 n. 77 (2000), citing 4 Cong. Rec. 174-75 (1875). Although the amendment proposed by Congressman Blaine did not pass the Senate, it inspired the adoption of “no-aid” provisions in many state constitutions. John C. Jefferies, Jr., and James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 305 (2001). By 1890, twenty-nine of the forty-five states had constitutional provisions that sternly and clearly prohibited the use of public money to support sectarian schools. *Id.*

The language of the Missouri Constitution and the history of its provisions requiring a separation of church and state make apparent that the framers intended to keep the local government and religious entities out of each other’s business. This is especially true when it comes to education. The Constitution was constructed with a clear purpose of prohibiting public resources from aiding education that had any hint of religious influence. In considering the issues raised in this case, the courts below reached their results by failing to give the Missouri Constitution its plain and unambiguous

meaning. The Court of Appeals reached the result it did only by relying on decisions interpreting the Establishment Clause of the federal constitution and decisions from the State of New York. Missouri's constitution is different than the Establishment Clause and the New York Constitution, given the precedent of this Court addressing the issues raised in this case, reliance on outside authorities is inappropriate.

2. Failing to Properly Construe the Missouri Constitution, Courts Below Erroneously Constructed Its Religious Provisions

A. The Appellate Court Erroneously Concluded that This Court’s Cases Applying Article IX, Section 8 of the Missouri Constitution Were Inapposite

The Missouri Constitution’s strict ban on the use of public resources to aid religious educational institutions applies to universities in exactly the same manner as it applies to elementary and secondary schools. The Court of Appeals suggested that this Court has never construed the phrase of a “university . . . controlled by a religious creed.” This allowed the Court of Appeals to escape this Court’s precedent, including *Harfst v. Hoegen* and *Berghorn v. Reorganized School Dist. No. 8*, which would make it extremely difficult to justify affirming the grant of summary judgment in this case. The Court of Appeals summarily dismissed this Court’s precedents with the conclusion that they involved “the constitutionality of state aid to private elementary and secondary schools, not a university like the one at issue here.” But this Court has held that an identical standard must be applied in either situation, stating that the Missouri Constitution “prohibits adoption of a different standard for schools of higher education from that applied to elementary-secondary schools.” *Americans United v. Rogers*, 538 S.W.2d 711, 720 (Mo. 1976) (en banc). This Court’s precedent clearly cannot be distinguished on the mere basis that they involved elementary and secondary schools rather than a university.

The only evidence offered that could support summary judgment was that Saint Louis University is governed by an independent board. (The trial court also ignored significant evidence and inferences showing that Saint Louis University is controlled by a Catholic creed, as discussed in Point 2B, *infra*.) The assertion that an educational institution is controlled by a lay board is an insufficient basis for determining—as a matter of summary judgment—that the institution is not controlled by a religious creed. This Court has previously rejected the notion that a school is not controlled by a religious creed simply because it is nominally controlled by a school board and not by a church. *See Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609, 613 (Mo. 1942). Allowing the presence of a lay board to be solely determinative “is but an indirect means of accomplishing that which the Constitution forbids.” *Id.* at 613. Even though the school had a board of directors and followed a course of secular instruction provided by qualified teachers, the numerous demonstrations of religious instruction required that public funds could not be used. *Id.*

In *Berghorn v. Reorganized School Dist. No. 8*, 364 Mo. 121, 260 S.W.2d 573 (1953), this Court confronted a similar set of facts and, while further defining the appropriate test, came to an identical conclusion. *Berghorn* involved three schools operated by the Roman Catholic Church but used by public school districts. *Id.*, 260 S.W.2d at 576. The schools in question had abandoned many of their past inherently sectarian activities. *Id.* They no longer distributed religious books, pamphlets, pictures, or literature and there was no longer any religious training given in the classrooms. *Id.*,

260 S.W.2d at 576-7. But, like at Saint Louis University, there was still a pervasively religious influence at the schools: the priests lived on the schools' land, there were crosses on the buildings, and classes were adjourned on Catholic Holy Days. *Id.*, 260 S.W.2d at 576. This Court held that it could not limit its consideration to any particular fact, but “must consider the total effect of all of the facts and circumstances.” *Id.*, 260 S.W.2d at 583. After considering all of the facts, this Court determined that the schools were under the control of a religious creed.

The lower courts have departed from *Harfst* and *Berghorn* by considering the bare assertion that Saint Louis University is controlled by a lay board in isolation to conclude, as a matter of law, that Saint Louis University is not a university controlled by a religious creed. The presence of an independent board is not enough if the board is only nominally independent, a factual question not susceptible to summary judgment based on the slim record here. And even assuming, *arguendo*, the board is truly independent, that fact cannot be considered in isolation from the facts in the record that suggest that Saint Louis University remains a religious university. The lower courts should have taken the same approach as *Harfst* and *Berghorn* and looked beyond just the presence of a lay board, investigating all the facts that could conceivably show that Saint Louis University is “controlled by a religious creed”. The court in *Berghorn* stressed the need to “consider the total effect of all of the facts and circumstances,” yet the lower courts failed to heed this warning. Given the important constitutional implications of the government actions at issue in this case, courts should require a robust factual record that is absent here.

B. All the Facts Tending to Show Whether Saint Louis University Is Controlled by a Religious Creed Must Be Considered Before Summary Judgment Can Be Granted

The grant of summary judgment is especially inappropriate where the assertion on which it hinges is as shockingly disingenuous as the claim that Saint Louis University is nothing more than a secular university. While it is surprising that the University would sell its heritage for \$8 million, the Constitution prevents this Court from allowing the sale to be completed. A brief investigation into the current status of the University puts in its secular nature into serious doubt, with many serious implications towards it being controlled by a religious creed.

The University's by-laws, which the trustees must follow in conducting their operations, clearly states that the University will be motivated and guided by a religious creed. The "Purposes and Essential Principles of the University" Article of the ByLaws explains that the trustees are to operate the University in harmony with its history as a Catholic and Jesuit university, and that:

- a. The University will be publicly identified as a Catholic university and as a Jesuit University
- b. The University will be motivated by the moral, spiritual and religious inspiration and values of the Judaeo-Christian tradition.

c. The University will be guided by the spiritual and intellectual ideals of the Society of Jesus.

d. The University, through the fulfillment of its corporate purposes, by teaching, research, and community service, is, and will be, dedicated to the education of men and women, to the greater glory of God, and to the temporal and eternal well-being of all men and women.

(Vol. III, Exh. C, Attachment 1, p.1). The President of the University, who is required to be a member of the Society of Jesus and “shall have the general and active management, control and direction of the business operation, educational activities and other affairs of the University,” stated that he must operate the university in accordance with these by-laws. (Vol. III, Exh. C, p.27). It is difficult to fathom how a university that is operated by a Jesuit President and a board trustees who must both follow the Jesuit tradition can summarily be declared a secular university.

Saint Louis University’s website raises further doubts as to how secular the university has become, featuring many prominent indications of the institution’s religious affiliation. When first visiting the website, the phrase “Jesuit Education Since 1818” is placed in capital letters directly under the university’s name. Saint Louis University, <http://www.slu.edu/x260.xml> (last visited Nov. 3, 2006). Navigating the website, this phrase is displayed in the header on every page. *Id.* One of the quotes on the front page, accompanied by a picture of Father Biondi, dressed in clerical clothing, states: “A Jesuit

education integrates the emotional, the psychological, the intellectual and the spiritual and encourages individuals to use their God-given talents to make a change in the world.” *Id.* Another, by Dr. Gharabagi, a Saint Louis University Professor, says, “SLU is a great place to grow personally as well as spiritually...” *Id.*

The first paragraph in the “About SLU” section states the university is both “a Jesuit, Catholic university” and that it is “the second oldest Jesuit university in the United States”. Saint Louis University – About SLU, <http://www.slu.edu/x5029.xml> (last visited Nov. 3, 2006). Another section, titled “Jesuit Mission”, lists reasons to choose a Jesuit school. Saint Louis University – Jesuit Mission, <http://www.slu.edu/x844.xml> (last visited Nov. 3, 2006). Yet another section of the website called “Mission Statement” describes the mission of the university and the things the university does in furtherance of this mission. Saint Louis University –Mission Statement, <http://www.slu.edu/x5021.xml> (last visited Nov. 3, 2006). Samplings from this section include: “The Mission of the Saint Louis University is the pursuit of truth for the greater glory of God...”; “dedicated to leadership in the continuing quest for understanding of God’s creation, and for the discovery, dissemination and integration of the values, knowledge and skills required to transform society in the spirit of the Gospels; and “guided by the spiritual and intellectual ideals of the Society of Jesus.” *Id.*

The “Student Life” section of the website also describes the religious nature of the institution. This section states: “For Catholic students, the Sunday 10 p.m. Mass is the primary celebration of our eucharistic community.” Saint Louis University – Student

Life, <http://www.slu.edu/x841.xml> (last visited Nov. 3, 2006). The “Mission & Ministry Resources for Faculty & Staff” section lists eleven different programs, retreats and conferences in which student and faculty can practice and enhance their faith. Saint Louis University – Mission & Ministry for Faculty & Staff, <http://www.slu.edu/x2411.xml> (last visited Nov. 3, 2006).

Saint Louis University’s students are also under the impression that they are attending a Catholic school. Expressing surprise at the University’s embrace of the Court of Appeals holding in this case, the University News asked:

Come again? Did Saint Louis University—an institution that constantly touts its status as one of the top five Catholic universities in the nation, an institution that, as Fr. Lawrence Biondi, S.J.[,] insists, will be the best Catholic university in the nation by 2012—just sell its religious identity for \$8 million? ... How can we claim to operate independent of a religious creed when crucifixes hang in SLU classrooms, when the Arts and Sciences core requires nine hours of theology[,], and when our president is a Jesuit priest?

UNews Staff, *If the Price is Right... SLU’s Identity Crisis*, THE UNIVERSITY NEWS (Nov. 9, 2006). Students are certainly under the impression they are attending a religious school. During a recent debate about whether to charter a socialist-leaning student organization, student leaders focused on what was proper for a Catholic university. In

favor of chartering the new organization, one representative said, “If a Catholic institution also claims to support democratic values, it should support a diversity of political views on campus[.]” Ian Darnell, *SGA, After Debate, Charters Socialist CSO*, THE UNIVERSITY NEWS (Mar. 23, 2006). Opposition to the student group also focused on the university’s Catholic identity: “The Church disagrees with the principals of socialism ... SLU is part of the Catholic Church. We should not, therefore, support a group that represents views that go against the Church[.]” *Id.*

Saint Louis University promotes itself and—by its by-laws—requires itself to be something other than a secular university. There is nothing wrong with the University’s desire to allow Catholic-Jesuit religious values to pervade the education that it provides; in fact, many students come to the University for that purpose. But it also demonstrates why this case was clearly inappropriate for summary judgment. Summary judgment is only appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. When considering an appeal from summary judgment, the court will review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993) (en banc). In the light least favorable to Saint Louis University, it has not come close to proving it is a secular institution.

In Missouri, summary judgment is governed by Civil Rules of Procedure, Rule 74.04. From the inception of this rule, it has been regarded as “an extreme and drastic

remedy” and it has been held that “great care should be exercised in utilizing the procedure.” *Cooper v. Finke*, 376 S.W.2d 225, 229 (Mo. 1964). The reason for caution in using summary judgment is that it “borders on denial of due process in that it denies the opposing party his day in court.” *Olson v. Auto Owners Ins. Co.*, 700 S.W.2d 882, 884 (Mo. App. 1985). The trial court and the appellate court have inappropriately applied a severe measure, denying defendants their day in court and opportunity to prove that Saint Louis University is a university under the control of a religious creed.

This concern about denying a party due process is especially significant in constitutional cases – as Justice Thomas stated in discussing an Establishment Clause test: “While the Court’s prior tests provide useful guideposts . . . no exact formula can dictate a resolution to such fact-intensive cases.” *Van Orden v. Perry*, 545 U.S. 677 (2005) (Breyer, J. concurring). Cases involving the separation of church and state are fact intensive. Courts’ decisions should be based on a thorough analysis of a robust record. Such an analysis will never occur in this case if the grant of summary judgment is affirmed.

A “genuine issue” exists where the record contains materials that evidence two plausible, but contradictory, accounts of the essential facts. *ITT Commercial*, 854 S.W.2d at 382. It “... is a dispute that is real, not merely argumentative, imaginary or frivolous.” *Id.* The record in this case amply demonstrates a genuine issue of fact.

CONCLUSION

Based on the foregoing, *amicus* ACLU of Eastern Missouri urges this Court to reverse the judgment of summary judgment and remand this case for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 4,716 words, exclusive of section exempted by the rules, determined using the word-count feature of Microsoft Office Word 2003. The undersigned further certifies that the accompanying floppy disk has been scanned and was found to be virus free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of this brief and one copy of the brief on floppy disk were served upon the counsel identified below by U.S. Mail, postage prepaid, on October 16, 2006:

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