

**IN THE
MISSOURI SUPREME COURT**

SAINT LOUIS UNIVERSITY,)	
)	
Respondent,)	
)	
vs.)	No. SC 88075
)	
MASONIC TEMPLE,)	
)	
Appellant.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT**

**BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND
STATE IN SUPPORT OF APPELLANT AS *AMICUS CURIAE***

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STATEMENT OF JURISDICTION AND STATEMENT OF FACTS

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

STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Americans United for Separation of Church and State (“Americans United”) is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Americans United has more than 75,000 members nationwide. Since its founding in 1947, Americans United has participated either as a party or as *amicus curiae* in many of the leading church-state cases decided by the U.S. Supreme Court, as well as in cases in the lower federal and state courts throughout the country. Americans United has significant experience litigating challenges to governmental funding of religious institutions. Because of our experience in Establishment Clause cases generally, and challenges such as this one in particular, Americans United believes that it can offer this Court special insight into the constitutional issues that this case raises.

SUMMARY OF ARGUMENT

The Establishment Clause of the First Amendment to the U.S. Constitution mandates that direct aid to religiously affiliated institutions be accompanied by adequate safeguards that protect against diversion of the aid to religious uses. But the Court of Appeals never considered whether the Tax Increment Financing (“TIF”) scheme at issue here satisfies this requirement. Put, simply:

it does not. The TIF ordinances will provide \$8 million in public funds to St. Louis University (“SLU”) to build a new arena. Even though SLU has already publicly proclaimed its intention to use that arena to host masses and other religious gatherings, under the ordinances, the grant will be awarded with no strings attached: SLU need not restrict its use of the public funds to secular purposes.

This unrestricted funding not only violates the Establishment Clause; it also violates the Missouri Constitution, which prohibits the use of any state aid for religious purposes. But again, the Court of Appeals never considered whether, under the state constitution, there should exist some limitation on the use of the funds to prevent diversion to sectarian purposes. By declining to analyze the TIF ordinances under federal Establishment Clause jurisprudence, and by ignoring the provisions of the state constitution that prohibit the religious use of governmental aid, the Court of Appeals rendered a decision that undermines Missouri’s long tradition of strict separation of church and state, and forced the taxpayers of St. Louis to support, against their will, the Jesuit faith promulgated by SLU.

POINTS RELIED ON

I. The Court of Appeals erred in affirming the trial court’s grant of summary judgment because the Court of Appeals failed to analyze the challenged governmental aid under the full constitutional landscape, in that, by basing its judgment solely on Article IX, § 8 of the Missouri Constitution, the Court of Appeals ignored both the federal

Establishment Clause and other state constitutional provisions, pursuant to both of which governmental aid to religious institutions must be accompanied by restrictions and safeguards against religious use of the aid.

1. *Tilton v. Richardson*, 403 U.S. 672 (1971)
2. *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976)
3. *Harfst v. Hoegen*, 163 S.W. 2d 609 (Mo. 1942)
4. *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976)

II. The Court of Appeals erred in failing to hold that the challenged governmental aid violates the federal Establishment Clause, because the Establishment Clause prohibits governmental aid to religiously affiliated institutions unless the aid is accompanied by safeguards that prohibit religious use of the aid, and the aid at issue here violates that rule in that it is not accompanied by such safeguards.

1. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973)
2. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 740 (1976)
3. *Mitchell v. Helms*, 530 U.S. 793 (2000)
4. *Agostini v. Felton*, 521 U.S. 203 (1997)

III. The Court of Appeals erred in failing to hold that the challenged aid violates the

Missouri Constitution, because the Missouri Constitution prohibits the provision to religiously affiliated institutions of direct or indirect governmental aid that can be used to support religious activity, and the aid at issue here violates that rule in that it is not accompanied by restrictions against its use for religious activity.

1. *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976)
2. *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73 (Mo. 1979)
3. Mo. Const. Art. I § 7
4. Mo. Const. Art. IX §8

ARGUMENT

I. The Court of Appeals Applied Only One Portion of One Provision of the Missouri Constitution, Improperly Ignoring the Broader Federal and State Constitutional Landscape

Resting solely on its determination that Article IX § 8 of the Missouri Constitution does not bar the provision of public funds to SLU because SLU is not controlled by a religious creed,¹ the Court of Appeals upheld the City of St. Louis's TIF ordinances² and failed to adequately consider the remaining constitutional standards under which appellant has challenged the TIF funding. Even assuming that the Court of Appeals correctly ruled that SLU is not controlled by a religious creed — a factual and legal question on which we take no position — compliance with the particular clause of Article IX § 8 that bars governmental aid to institutions controlled by a religious creed should not and does not preclude an analysis of the funding under both the federal Establishment Clause and other relevant provisions of the Missouri Constitution.

Both the federal Establishment Clause and certain provisions of the Missouri Constitution restrict the use of governmental aid to secular purposes and thereby require the imposition of

¹ *St. Louis Univ. v. Masonic Temple Ass'n.*, __ S.W.3d __, No. ED 86804, 2006 WL 2805606, at *6 n.3 (Mo. App. E.D. Oct. 3, 2006).

² *City of St. Louis, Mo.*, Ordinances 65703 (Nov. 15, 2002), 65857 (Feb. 25, 2003), 65858 (Feb. 23, 2003).

safeguards to ensure the aid is not diverted to religious uses. The TIF ordinances provide absolutely no protection against diversion of the aid authorized thereunder. By failing to evaluate these ordinances in light of the full constitutional landscape, the Court of Appeals simply missed this significant constitutional infirmity and consequently erred in granting judicial cover to the City of St. Louis's gift of \$8 million in unrestricted public funds to a religiously affiliated institution.

A. The Court of Appeals Improperly Declined to Evaluate the TIF Ordinances Under the Federal Establishment Clause

Noting that the Missouri Constitution “is more restrictive than the First Amendment in prohibiting expenditures of public funds in a manner tending to erode an absolute separation of church and state,” the Court of Appeals declined to review the appellant's federal Establishment Clause argument.³ But because any aid program barred by the Establishment Clause must also be prohibited under the Missouri Constitution, the appellate court erred by failing to analyze the funding under the federal Establishment Clause.⁴ The court thus ignored controlling federal law

³ *St. Louis Univ.*, 2006 WL 2805606, at *4 (quoting *Americans United v. Rogers*, 538 S.W.2d 711, 720 (Mo. 1976)).

⁴ See *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 454 (Mo. 1959) (First Amendment's religion clauses have been made applicable to states by Fourteenth Amendment).

regarding governmental aid to religious institutions. As we explain below, the aid program at issue here runs afoul of a fundamental Establishment Clause requirement: that direct aid to a religiously affiliated institution (even if awarded on a neutral basis and for a secular purpose) must be accompanied by adequate safeguards to ensure that it is not diverted to sectarian uses.⁵

B. The Court of Appeals’ State Constitutional Analysis Improperly Focused on Only One Portion of One Provision of the Missouri Constitution

Moreover, although the Court of Appeals grounded its decision not to engage in an Establishment Clause analysis on the fact that the Missouri Constitution offers broader church-state protections than the First Amendment, the court failed to impose the full extent of the restrictions required by the state constitution and thus authorized an aid program that is also barred by that constitution. As noted above, the Court of Appeals adopted a narrow view of the state constitutional limits on governmental aid to religiously affiliated institutions: The court treated one of several prohibitions in Article IX § 8 — that no public body may provide aid to any educational institution “controlled by a religious creed” — as the full scope of the constitution’s regulation of aid to religiously affiliated schools. Under the court’s flawed conception of the Missouri Constitution, any religiously affiliated university that is not *controlled* by a particular religious creed apparently may receive governmental aid in a wholly indiscriminate manner and

⁵ See *infra*, §§ II(A)-(C).

use that aid for whatever purposes it desires, including religious ones.

But this result is incongruous with the constitutional policy of the State of Missouri, which has decreed the “absolute separation of church and state, not only in governmental matters, but in educational ones, as well.”⁶ Rather, the high wall of separation imposed by the Missouri Constitution demands that state aid — whether direct or indirect — never be diverted to religious uses. For instance, with respect to education, a portion of Article IX § 8 that the appellate court simply ignored provides that no city “shall ever make an appropriation or pay from any public fund *whatever, anything* in aid of any religious creed, church, *or sectarian purpose*.”⁷

Another Article of the Missouri Constitution that the Court of Appeals failed to adequately consider — Article I § 7 — provides that “no money shall ever be taken from the public treasury, *directly or indirectly*, in aid of any church, sect or denomination of religion, or any priest, preacher, minister, or teacher thereof.”⁸ Citing no legal authority, the court arbitrarily declared that “[b]ecause we would find that SLU is not controlled by a religious creed, it cannot qualify as an extension of a religion for purposes of Article I, Section 7.”⁹ But this Court has never ruled that a religiously affiliated university or school that does not meet the religious-creed threshold of

⁶ *Harfst v. Hoegen*, 163 S.W. 2d 609, 614 (Mo. 1942).

⁷ Mo. Const. art. IX, § 8 (emphasis added).

⁸ Mo. Const. art. I, § 7 (emphasis added).

⁹ *St. Louis Univ.*, 2006 WL 2805606, at *6 n.3.

Article IX § 8 is automatically exempt from other constitutional provisions prohibiting the use of governmental aid for religious purposes. As explained above, such a result would undermine Missouri’s strict separation of church and state.

Indeed, this Court has recognized that Article I § 7 and the religious-creed limitation of Article IX § 8 set forth *different* restrictions, which apply to governmental aid independently of each other. In *Harfst*, for example, after holding that a school district’s financial support of a parochial school controlled by the Catholic denomination was unconstitutional under Article XI § 11 (which today is Article IX § 8), this Court conducted a separate analysis of the aid under Article I § 7, noting that “our Constitution goes even farther than those of some other states. In addition to the provisions already mentioned we still have another. Art. [I] § 7 [contains] * * * an explicit interdiction of the use of public money for a teacher of religion.”¹⁰

II. The TIF Ordinances Violate the Establishment Clause Because They Impose No Safeguards To Ensure That SLU Does Not Divert the Governmental Aid to

¹⁰ 163 S.W.2d at 613. *See also Mallory v. Barrera*, 544 S.W.2d 556, 561 (Mo. 1976) (barring “use of any part of Title I funds by the state to provide teaching services to elementary and secondary school children on the premises of parochial schools” because such use would “constitute the use of public funds (a) in aid of a denomination of religion proscribed by Art. I, [§] 7; and (b) to help to support or sustain a school controlled by a sectarian denomination proscribed by” Article IX § 8).

Religious Uses

A. The Establishment Clause Requires Limitations On the Use of Direct Governmental Aid to Religious Organizations

“[A]ny use of public funds to promote religious doctrines violates the Establishment Clause.”¹¹ State aid therefore may not, under any circumstances, be directed to “fund[] a specifically religious activity even in an otherwise ““substantially secular setting.””¹² Thus, “in the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes * * * direct aid in whatever form is invalid.”¹³ For instance, in *Tilton v. Richardson*, the U.S. Supreme Court examined the constitutionality of a statute that provided grants to “institutions of higher education for the

¹¹ *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O’Connor, J., concurring).

¹² *Id.* at 613 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)). *See also Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 747 (1976) (“The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact, the State is lending direct support to a religious activity.”).

¹³ *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973). *See also Tilton v. Richardson*, 403 U.S. 672, 682 (1971) (aid statute must have adequate “provisions * * * to ensure that the impact of federal aid will not advance religion”).

construction of a wide variety of academic facilities.”¹⁴ The statute, however, expressly excluded funding for “[a]ny facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity.”¹⁵ Four “*church-related* colleges and universities” received grants under the Act, prompting plaintiffs’ suit alleging that the grants to the religiously affiliated schools violated the Establishment Clause.¹⁶

In evaluating the constitutionality of the governmental aid to the religiously affiliated universities, the Court highlighted the extensive safeguards in place to prevent the diversion of the aid to religious uses. Noting that the statute “was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions,” the Court pointed out that the challenged Act authorized grants and loans only for “academic facilities that will be used for defined secular purposes” and “expressly prohibit[ed] their use for religious instruction, training or worship.”¹⁷ The Court further noted that the statute specifically permitted the government to recover funds from any institution that violated the secular-use restriction.¹⁸ And there was evidence in the record that use under the statute had been

¹⁴ *Id.* at 675 (quotation omitted).

¹⁵ *Id.* (quotation omitted).

¹⁶ *Id.* at 676.

¹⁷ *Id.* at 679-80.

¹⁸ *Id.* at 680.

monitored, with certain organizations being required to disgorge funds for violating the provisions against sectarian use.¹⁹ But, despite these extensive safeguards, because Congress only provided for this enforcement remedy for a period of twenty years — after which there were no further restrictions on the use of the government-funded facilities — the Court held that the statutory safeguards were insufficient to ensure that the buildings would not be put to sectarian use in the future.²⁰ Consequently, the Court excised the twenty-year limitation, so that the prohibition on religious use became permanent, and only then upheld the aid program, as modified with sufficient safeguards.²¹

Similarly, in *Hunt v. McNair*,²² the Court upheld governmental aid to a religious university only after the Court was satisfied that adequate safeguards were in place to protect against diversion of the aid to religious purposes. The challenged statute set up a traditional bond-financing program to assist colleges and universities in obtaining funding for the construction of campus buildings and facilities.²³ After the Baptist College of Charleston’s application for aid

¹⁹ *Id.* at 682.

²⁰ *Id.* at 682-83 (“it cannot be assumed that a substantial structure has no value after [twenty years] and hence the unrestricted use of a valuable property is in effect a contribution of some value”).

²¹ *Id.* at 684.

²² 413 U.S. 734 (1973).

²³ *Id.* at 737-38. The nature of the aid to religious universities provided under *Hunt* is

under the statute received preliminary approval, plaintiffs sued, alleging that provision of such funding to a religiously affiliated institution violated the Establishment Clause.²⁴

Like the challenged statute in *Tilton*, the statute at issue in *Hunt* “specifically state[d] that a project ‘shall not include’ any buildings or facilities used for religious purposes.”²⁵ This provision, combined with the requirement that “every lease agreement * * * contain a clause forbidding religious use and another allowing inspections to enforce the agreement” left the Court “satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion.”²⁶

And in *Roemer v. Board of Public Works of Maryland*,²⁷ the Supreme Court considered a Maryland statute that authorized a general grant of funds to private institutions of higher education in Maryland. The funds were authorized for general use, subject only to the limitation that “[n]one of the moneys payable * * * shall be utilized by the institutions for sectarian

entirely distinguishable from the aid authorized under the TIF ordinances. Whereas the aid in *Hunt* simply facilitated the provision of tax-exempt bonds that the universities would have to repay, the TIF aid is a direct cash subsidy of \$8 million. *See infra*, § II(A).

²⁴ *Hunt*, 413 U.S. at 738-39.

²⁵ *Id.* at 744.

²⁶ *Id.* at 744-45.

²⁷ 426 U.S. 736, 740 (1976).

purposes.”²⁸ Additionally, those institutions that primarily awarded theological or seminary degrees were excluded from participation.²⁹

Following the precedents of *Tilton* and *Hunt*, the Supreme Court emphasized that while “a secular purpose” and “facial neutrality” are required aspects of a constitutional aid scheme, they “may not be enough.” The Court explained: “The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.”³⁰ The Court ultimately held the aid program in *Roemer* constitutional because there were specific protections built into the scheme to enforce the religious-use prohibition.³¹

²⁸ *Id.* at 740-41.

²⁹ *Id.* at 741.

³⁰ *Id.* at 747.

³¹ *Id.* at 755-61.

More recently, in *Mitchell v. Helms*³² and *Agostini v. Felton*,³³ the Supreme Court reaffirmed the longstanding requirement that governmental aid to religious institutions be accompanied by adequate safeguards to protect against diversion to religious uses. In *Mitchell*, the Court upheld an aid program that loaned educational materials and equipment to parochial schools, in part because “[t]he safeguards employed by the program [were] constitutionally sufficient.”³⁴ The challenged aid program — under which the federal government channeled funds to state departments of education that, in turn, funneled the money to local educational agencies (usually public school districts) to buy and lend to public and private schools certain library and media materials, computer software and hardware, and other educational equipment

³² 530 U.S. 793, 850, 857-58, 861-63 (2000) (O’Connor, J., concurring). Justice O’Connor’s concurrence in *Mitchell* — not the plurality opinion — controls, as it sets forth the narrowest grounds for deciding the case. *See, e.g., Cmty. House, Inc. v. City of Boise*, __ F.3d __, No. 05-36195, 2006 WL 3231393, at *13 (9th Cir. Nov. 9, 2006); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 (4th Cir. 2001); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 418 (2d Cir. 2001); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001).

³³ 521 U.S. 203 (1997).

³⁴ 530 U.S. at 861 (O’Connor, J., concurring).

identified and requested by the schools³⁵ — was accompanied by extensive safeguards to prevent diversion of the educational materials to religious uses. The federal statute explicitly limited the aid to “secular, neutral, and nonideological services, materials, and equipment” and “prohibit[ed] any payment . . . for religious worship or instruction.”³⁶ And at the state level, the Department of Education (1) “require[d] all nonpublic schools to submit signed assurances that * * * the instructional materials and equipment will only be used for secular, neutral and nonideological purposes,” and (2) carried out “monitoring visits” to the local educational agencies and some of the private aid recipients during which, among other things, state officials conducted random reviews of loaned library books for religious content.³⁷ Finally, at the local level, the defendant school district imposed a number of additional safeguards on private schools seeking educational materials and equipment: schools were required to “submit applications, complete with specific project plans, for approval”; the district reviewed private schools’ requests for library books and rejected “any book whose title reveal[ed] (or suggest[ed]) a religious subject matter”; and the district conducted its own monitoring visits to each school receiving aid, during which district officials reviewed “the manner in which the school ha[d] used” the aid to support its project plans, reminded the private school officers that the aid may not be used for religious purposes,

³⁵ *Id.* at 802-03 (plurality opinion).

³⁶ *Id.* at 861 (O’Connor, J., concurring) (quotation and citation omitted).

³⁷ *Id.* at 862 (O’Connor, J., concurring) (internal quotation and citation omitted).

reviewed random samples of the loaned materials and equipment to ensure that they were “appropriately labeled and that the school ha[d] maintained a record of their usage,” and “randomly select[ed] library books [acquired through the aid program] to ensure that they compl[ied] with the program’s secular content restriction.”³⁸

Similarly, in *Agostini*, upholding a federal program that provided remedial education teachers to parochial schools, the Court highlighted a variety of measures employed to ensure that the governmental aid was not diverted to an improper use: teachers were public employees “accountable only to their public-school supervisors”; teachers were prohibited from sharing materials or team-teaching with parochial school teachers and from becoming involved in school religious activities; teachers were required to remove religious symbols from the classrooms they used; and publicly employed field supervisors made monthly, unannounced visits to each teacher’s classroom to verify compliance with all restrictions.³⁹

As this line of cases illustrates, the rule requiring that governmental aid to religiously affiliated institutions be accompanied by safeguards ensuring that no funds will support or finance sectarian activities or education has been consistently applied by the courts.⁴⁰ This Court should

³⁸ *Id.* at 862-63 (O’Connor, J., concurring) (internal quotations and citations omitted).

³⁹ 521 U.S. at 211-12, 233-35.

⁴⁰ *See Bowen*, 487 U.S. at 615 (“There is no doubt that the monitoring of * * * grants is necessary if the [state] is to ensure that public money is to be spent * * * in a way that comports

evaluate the TIF ordinances under this well-settled case law, and thereby correct the Court of Appeals' error in ignoring appellant's Establishment Clause challenge.

B. Constitutionally Adequate Safeguards are Both Mandatory and Necessary to Ensure that SLU Does Not Divert TIF Funds to Religious Uses

The TIF ordinances and the funding they authorize run afoul of the fundamental Establishment Clause requirement that direct governmental aid to religious institutions be restricted to secular uses. In contrast to the challenged programs in *Tilton*, *Hunt*, *Roemer*,

with the Establishment Clause.”); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (“Of course, under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services.”); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973); *Levitt v. Comm. For Pub. Educ. & Religious Liberty*, 413 US. 472, 480 (1973); *Laskowski v. Spellings*, 443 F.3d 930, 938 (7th Cir. 2006) (“[I]n this case, where money was being given to a religious program with a secular component, it was important that there be some mechanism for limiting the use of the money to the secular component.”); *Freedom from Religion Found. v. Bugher*, 249 F.3d 606, 614 (7th Cir. 2001) (quoting *Nyquist*, 413 U.S. at 780, with approval); *Freedom from Religion Found. v. McCallum*, 179 F. Supp. 2d 950, 967 (W.D. Wis. 2002) (“When the constitutionality of state funding is measured by how taxpayer money is used by a recipient, the state must monitor the activities that are supported by that funding.”).

Mitchell, and *Agostini*, the TIF ordinances contain not a *single* restriction or safeguard to ensure that the funds provided to SLU are not diverted to improper purposes. Such restrictions and safeguards are lacking even though the TIF funding is the very sort of governmental aid that most needs and requires restrictions and safeguards: the TIF ordinances provide a *direct cash grant* to a religiously affiliated organization, which has already announced plans to put the funds to a religious use. Accordingly, without safeguards, the TIF funding scheme violates the Establishment Clause.

1. The TIF Ordinances Provide Direct Governmental Aid to SLU.

The Establishment Clause’s prohibition on the use of state aid for religious purposes is, in some instances, relaxed with respect to governmental aid that is not direct but is instead indirect, remote, and incidental.⁴¹ Thus, reasoning that traditional government bond-financing programs provide only secular, indirect, remote, and incidental aid, a handful of courts have upheld these

⁴¹ See *Nyquist*, 413 U.S. at 771, 775 (noting that “not every law that confers an indirect, remote, or incidental benefit upon religious institutions is, for that reason alone, constitutionally invalid,” and that “an indirect and incidental effect beneficial to religious institutions has never been thought as sufficient defect to warrant the invalidation of a state law”) (quotations omitted); *Walz v. Tax Comm’n*, 397 U.S. 664, 674-80 (1970) (upholding property tax exemptions for churches because the aid provided was only an “indirect economic benefit”).

programs when the programs have assisted religious institutions.⁴² But even assuming that those courts correctly ruled that traditional bond-financing programs do not provide sufficient aid to religious institutions to trigger the full panoply of Establishment Clause restrictions — and the Supreme Court has reserved judgment on this question⁴³ — those courts’ opinions are inapposite here because the TIF funding scheme provides governmental aid that is of an entirely different nature. Whereas traditional bond programs afford only “incidental” aid to religious universities in the form of the opportunity to “borrow funds on the basis of their own credit and the security of

⁴² See generally, e.g., *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682 (Va. 2000); *Steele v. Indus. Dev. Bd.*, 301 F.3d 401 (6th Cir. 2002).

⁴³ Whether the U.S. Supreme Court will agree that traditional bond financing provides only indirect, remote, and incidental aid that is exempt from Establishment Clause rules such as the prohibition against religious use and the requirement of effective safeguards remains unclear, as the Supreme Court has never reached the question. The Court stopped short of that issue in *Hunt*, 413 U.S. at 744 n.7 — which challenged a traditional bond-financing program — since, in that case, the bond scheme expressly imposed safeguards against use of the aid for religious purposes: the statute prohibited bond financing for projects that included “any buildings or facilities used for religious purposes,” and every lease agreement for any building erected in connection with the bond financing was required to “contain a clause forbidding religious use and another allowing inspections to enforce the agreement.” *Id.* at 744.

their own property upon more favorable interest terms than otherwise would be available,”⁴⁴ the TIF ordinances provide much more: they confer upon SLU an \$8 million windfall in the form of a direct cash subsidy.

In *Virginia College Building Authority v. Lynn*, for example, the Supreme Court of Virginia upheld a government bond program to help a Christian university (Regent University) finance a variety of new buildings, including classrooms, administrative space, a communications-and-arts complex and an events center, as well as to refinance student housing.⁴⁵ Under the bond program, the Virginia College Building Authority — a separate state entity created to carry out the authorizing legislation — issued tax-exempt bonds, and loaned the bond proceeds to universities and colleges for the construction of educational facilities.⁴⁶ The university or college that received the bond proceeds was then obligated to repay bond holders through a trustee who “monitor[ed] the institution’s payments, credit-worthiness, and compliance with terms of the loan.”⁴⁷ Under the program, the governmental authority had “no active role” after the bonds were issued: (1) “[n]o taxpayer dollars [were] pledged or utilized as surety for the

⁴⁴ *Va. Coll. Bldg. Auth.*, 538 S.E.2d at 695.

⁴⁵ *Id.* at 687-88.

⁴⁶ *Id.*

⁴⁷ *Id.* at 687.

bond obligations”; (2) the bonds did not “constitute a debt or liability of the Commonwealth”; (3) the bonds did not “directly or indirectly or contingently obligate the Commonwealth * * * to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment”; (4) the university paid “all costs associated with the issuance of the bonds”; and (5) perhaps most significantly, “[n]o taxpayer dollars [were] transferred directly or indirectly” to the religious university.⁴⁸

Accordingly, the court explained: “The nature of the aid is properly defined as the granting of tax exempt status to the bonds which has the incidental result of permitting a qualifying institution to borrow funds at an interest rate lower than conventional private financing.”⁴⁹ In other words, the court reasoned that the state simply provided a “governmental service” by acting as a “mere conduit” for private funds, rather than as a grantor of public funds.⁵⁰ Nevertheless, it is worth noting that — even though the Virginia Supreme Court treated the bond statute as providing indirect, incidental, and remote aid that could be directed to pervasively sectarian institutions and that required no safeguards — the statute *did* expressly prohibit use of the bond proceeds for projects that included “any facility used or to be used for sectarian

⁴⁸ *Id.* at 687-88, 698.

⁴⁹ *Id.* at 698. *See also, e.g., Steele*, 301 F.3d at 415-16.

⁵⁰ *See Va. Coll. Bldg. Auth.*, 538 S.E.2d at 696 (quoting *Hunt v. McNair*, 187 S.E.2d 645, 650 (S.C. 1972)).

instruction or as a place of religious worship.”⁵¹

But the TIF Ordinances authorize an aid program that, in character and nature, is nearly the exact opposite of a traditional bond-financing plan such as those in *Virginia College Building Authority* and *Hunt*. Under the TIF scheme, after the city issues TIF bonds in order to raise funds for the construction of SLU’s arena and then gives the bond proceeds to SLU, SLU is not required to repay the bond proceeds to anyone. Instead, the bonds are “special obligations of the City,”⁵² which are secured by future “new taxes” that the city anticipates imposing as a result of increased property values and economic activity in the designated TIF redevelopment area.⁵³ The

⁵¹ *Va. Coll. Bldg. Auth.*, 538 S.E.2d at 687.

⁵² City of St. Louis, Mo., Ordinance 65703, Ex. A, § II(E); Ordinance 65858, Ex. B. *See also* City of St. Louis, Mo., Ordinance 65857, Ex. A, § 3.

⁵³ City of St. Louis, Mo., Ordinance 65703, Ex. A, § II(A); Ordinance 65857, Ex. A, § 3; Ordinance 65858, Ex. B. Specifically, the TIF ordinances provide that half of all EATS revenues (the “total additional revenue from taxes, penalties and interest which are imposed by the City or other taxing districts, and which are generated by economic activities within a Redevelopment Area over the amount of such taxes, penalties and interest in the calendar year prior to the adoption of this ordinance”) and all PILOTS revenues (“those estimated revenues from real property in the Redevelopment Area * * * which taxing districts would have received had the City not adopted tax increment allocation financing, and which would result from levies made

City, using these new taxes, pays all costs associated with issuance of the bonds, including paying off the bond obligations in their entirety. SLU, meanwhile, receives \$8 million in direct public funds to build its arena and need not pay back a dime of the bond proceeds: that onus falls on the City and, ultimately, the taxpayers.

2. SLU Maintains Strong Ties to the Jesuit Order

“[R]egardless of whether schools are pervasively sectarian or not, states may not make unrestricted cash payments directly to religious institutions.”⁵⁴ The Supreme Court has long recognized the risk of diversion posed by such aid and, in particular, the “special Establishment Clause dangers” that exist “where the government makes direct money payments to sectarian institutions.”⁵⁵ Thus, in *Tilton*, the Supreme Court held that grants and loans provided to four

after the time of the adoption of tax increment allocation financing during the time the current equalized value of real property in the Redevelopment Area exceeds the total initial equalized value of real property in such area”) be put into a special allocation fund, from which the city will pay off the bonds. City of St. Louis, Mo., Ordinance 65703, Ex. A, §§ 4-7, Ordinance 65857, Ex. A, §§ 1-3.

⁵⁴ *Bugher*, 249 F.3d at 612.

⁵⁵ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995). *Accord Mitchell*, 530 U.S. at 818-19 (plurality opinion); *id.* at 843-44 (O’Connor, J., concurring); *Bowen*, 487 U.S. at 608-09; *Roemer*, 426 U.S. at 747; *Hunt*, 413 U.S. at 742; *Tilton*, 403 U.S. at 679-80;

“institutions affiliated with religious organizations” — including Sacred Heart University, Annhurst College, Fairfield University (which, like SLU, was a Jesuit school), and Albert Magnus College — to construct a variety of buildings were unconstitutional to the extent that no safeguards were imposed to prevent the universities from diverting the aid to religious uses decades later.⁵⁶ Despite holding that religion did not “so permeate[] the secular education provided by the church-related colleges and universities that their religious and secular educational functions [were] in fact inseparable,” the Court nevertheless recognized the danger of diversion and the necessity for safeguards.⁵⁷

Bd. of Educ. v. Allen, 392 U.S. 236, 243-44 (1968); *see also Mitchell*, 530 U.S. at 890 (Souter, J., dissenting) (“from the start we have understood the Constitution to bar outright money grants of aid to religion”); *McCallum*, 179 F. Supp. 2d at 974 (recognizing that plurality, concurrence, and dissent in *Mitchell* “all noted that special dangers arise when *money* grants are given directly to religious institutions”).

⁵⁶ *Tilton*, 403 U.S. at 677, 683-84.

⁵⁷ *Id.* at 680, 683-84; *see also Bowen*, 487 U.S. at 616 (noting that *Roemer*, *Hunt*, and *Tilton*, all “involv[ed] aid to institutions that were not pervasively sectarian”); *Roemer*, 426 U.S. at 758 (comparing College of Notre Dame, Mount Saint Mary’s College, Saint Joseph College, and Loyola College to universities and colleges in *Tilton* and *Hunt*, and upholding lower court’s ruling that the colleges were not pervasively sectarian).

There is ample evidence here that SLU — like the colleges and universities in *Tilton*, *Roemer*, and *Bowen* — maintains a strong affiliation with a religious denomination and, in particular, that SLU aims through its operation to promulgate the tenets of the Jesuit faith. The University’s mission statement plainly declares that:

The Mission of Saint Louis University is the pursuit of truth for the greater glory of God and for the service of humanity. * * * It is 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. As a Catholic, Jesuit university, the pursuit is motivated by the inspiration and values of the Judaeo-Christian tradition and is guided by the spiritual and intellectual ideals of the Society of Jesus.⁵⁸

SLU carries out this religious mission partly by requiring all students to complete three courses in theological studies, including one course each in theological foundations, theological specialties (a 200-level course), and theological issues (a 300-level course).⁵⁹ Offered by the Theological Studies Department, where the “primary focus is the academic study of the Christian

⁵⁸ St. Louis University Mission Statement, <http://www.slu.edu/x5021.xml> (last visited Dec. 7, 2006).

⁵⁹ St. Louis University Core Curriculum, *The Whole Picture*, http://www.slu.edu/colleges/AS/what_is_the_core_2.html (last visited Dec. 7, 2006).

tradition and its relationship to other religious traditions,”⁶⁰ these mandatory courses aim to teach students to “examine their own religious experience and to apply theological thought to their personal and professional lives in the service of humanity.”⁶¹ Specifically, the theological foundations course “introduces students to the disciplined reflection on religion in the University.”⁶² In continuing their mandatory theological studies, among the 200-level courses from which students may choose for Spring 2006 are: New Testament; Old Testament; Archaeology of the Bible; Introduction to Biblical Hebrew; New Testament, The Church and World Since 1500; American Christianity; U.S. Catholicism; Jesus & Salvation; The Church: Yesterday and Today; Christian Sacraments; Christian Morality; and Jerusalem: City of Three Faiths.⁶³ And among the 300-level courses that students may choose from in Spring 2006 to

⁶⁰ St. Louis University Department of Theological Studies, <http://www.slu.edu/colleges/AS/theology> (last visited Dec. 7, 2006).

⁶¹ St. Louis University Core Curriculum, The Whole Picture, http://www.slu.edu/colleges/AS/what_is_the_core_2.html (last visited Dec. 8, 2006).

⁶² St. Louis University Course Descriptions, http://www.slu.edu/colleges/PS/all_sps_courses.html (last visited Dec. 7, 2006).

⁶³ St. Louis University Theology Course Listing, Spring 2006, <http://theology.slu.edu/courses/spring2006.pdf> (last visited Dec. 7, 2006).

satisfy their third theological studies requirement are: Old Testament Themes and Issues; New Testament Ethics; Mary and Her Sisters; Marriage and Christian Vocation; Theology of Christian Prayer; and Christian Spiritual Traditions.⁶⁴ The fact that the overwhelming majority of the courses from which students must choose to satisfy the theological studies requirements deal with explicitly Christian themes further evidences SLU's continuing religious affiliation and commitment to the promulgation of Christian doctrine.

And perhaps most revealing of SLU's ongoing religious affiliation and mission to minister, preach, and teach religion — and, in particular, the Jesuit faith — is its “Jesuit Hiring Policy,” under which SLU claims an exemption from the federal law prohibiting religious discrimination in hiring.⁶⁵ The policy, which “applies to all divisions of Saint Louis University,” including

⁶⁴ *Id.*

⁶⁵ St. Louis University Jesuit Hiring Policy, http://www.slu.edu/services/HR/policies_jesaa.html (last visited Dec. 7, 2006). The policy relies on language in Title VII of the Civil Rights Act of 1964, § 703(e)(2), 42 U.S.C. § 2000e-2(e)(2) (1964), that provides that “it shall not be an unlawful employment practice for a school, college, university, or other educational institution * * * to hire and employ employees of a particular religion if such school, college, university, or other educational institution * * * is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution * * * is directed toward the propagation of a particular religion.”

academic departments, declares that “[t]o preserve the existing relationship between the University and the Jesuits, the University may grant preferences in its employment practices to Jesuits to perform any work.”⁶⁶

These SLU policies make clear that the university’s religious affiliation is strong and ongoing, and that this religious affiliation influences the operation of the university at both the institutional and day-to-day levels. Thus, as a matter of law, any direct governmental aid to SLU must be restricted from religious use by strong and effective safeguards. Moreover, such safeguards are not merely legally required here, but they are necessary in light of public proclamations by SLU that it intends to use the arena, once built, for religious purposes: In a flyer touting the new arena and seeking private donations to help build it, SLU promised potential donors that, in addition to hosting SLU basketball games, the “new multipurpose campus events center also will be the site of * * * [r]eligious gatherings, such as large Masses.”⁶⁷

(Emphasis added).

⁶⁶ St. Louis University Jesuit Hiring Policy, http://www.slu.edu/services/HR/policies_jesaa.html (last visited December 7, 2006).

⁶⁷ See Exhibit E to Deposition of Father Lawrence Biondi (marked as Exhibit C in Volume 2 of Legal File exhibits).

C. The TIF Ordinances Provide No Safeguards Against the Diversion of Public Funds to Religious Uses by SLU

Despite the Supreme Court’s long history of imposing safeguards on direct governmental aid to religious institutions, and the clear risk of diversion in this case in particular, the TIF ordinances impose absolutely *no safeguards or limitations* on SLU’s use of the appropriated public funds. Unlike the aid programs upheld in cases such as *Mitchell* and *Agostini*, the TIF ordinances contain no express language limiting the use of the aid to secular purposes.

Commenting that an arena is “a secular facility,” the appellate and circuit courts mistook the ordinances’ purpose — to provide funding for the SLU arena — for a constitutionally adequate safeguard on the use of the funds.⁶⁸ But as the Supreme Court recognized in *Tilton*, a facility that appears to have a secular function can easily be diverted to sectarian uses. The challenged statute in *Tilton* expressly restricted federally funded buildings to secular uses for 20 years and required that the universities provide assurances of such secular use; the buildings themselves were “religiously neutral” and some of the buildings, such as the language laboratory at Albert Magnus College, “seem[ed] peculiarly unrelated and unadaptable to religious indoctrination”; and “[t]here [was] no evidence that religion seep[ed] into the use of any of these facilities.”⁶⁹ Nevertheless, the Court held that the safeguards were “inadequate to ensure that the

⁶⁸ *St. Louis Univ.*, 2006 WL 2805606, at *4; Legal File at 250 (Circuit Court Op. at 11).

⁶⁹ 403 U.S. at 681, 688.

impact of the federal aid will not advance religion” because “[l]imiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period.”⁷⁰ The Court posited that “[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.”⁷¹ Accordingly, mere identification by the courts or by a grantee of the structure to be built with government funds as “a secular facility” does not provide any protection against its future use for religious purposes. Indeed, this Court can take judicial notice of the fact that a sports arena can *easily* be used for religious purposes, including as a church. For example, the Compaq Center — the former home of the Houston Rockets basketball team — has been converted into the home of Lakewood Church, the “mega-church” of pastor Joel Osteen.⁷² Without adequate safeguards, such as the

⁷⁰ *Id.* at 682-83.

⁷¹ *Id.* at 683; *see also Nyquist*, 413 U.S. at 776-77 (noting that *Tilton* held that “tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities,” and concluding that “[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.”).

⁷² *See* Joel Osteen’s Lakewood Church, <http://houston.about.com/od/spiritualityreligion/p/lakewood.htm> (last visited Dec. 7, 2006).

express restrictions imposed in cases like *Tilton*, *Mitchell*, and *Agostini*, a direct-aid program such as that authorized by the TIF ordinances is unconstitutional.⁷³

Furthermore, even *if* the initial TIF authorization of financing for the SLU arena could somehow be construed as being intended to restrict the use of the arena to secular purposes, the TIF ordinances contain no mechanism for enforcing any such limitation. As the Supreme Court explained in *Levitt*, “the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination.”⁷⁴ Thus, even though the challenged statute there — which authorized the state to reimburse nonpublic schools for expenses incurred in connection with the administration, grading, compiling, and reporting of test results — prohibited payments for “religious worship or instruction,” the Court held the funding unconstitutional because “no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.”⁷⁵

⁷³ See *Nyquist*, 413 U.S. at 774 (striking down government funding of religious schools’ maintenance costs because “[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes”).

⁷⁴ *Levitt*, 413 US. at 480.

⁷⁵ *Id.* at 477, 480. See also *Bugher*, 249 F.3d at 609, 613 (holding that a letter accompanying government grants to religious schools that purported to “restrict the use of the grant money” to “educational technology purposes” did not impose any enforceable limitation on

By contrast, in *Mitchell*, the challenged aid program required recipients to provide assurances that the aid was used only for secular purposes and never diverted to religious uses; and, among other measures, the government conducted inspections to ensure compliance.⁷⁶ Similarly, in *Roemer*, the State of Maryland ensured that religious colleges and universities receiving annual state subsidies complied with the subsidies’ one restriction — that no state funds be used for “sectarian purposes” — “through a process of annual interchange-proposal and approval, expenditure and review.”⁷⁷ This process required, among other things, that aid applications include an affidavit from a university’s chief executive officer promising that the “funds will not be used for sectarian purposes” and providing a description of the specific nonsectarian uses that were planned; that the universities segregate state funds in a special account and “identify aided nonsectarian expenditures separately in its budget”; and that the universities “retain sufficient documentation of the State funds expended to permit verification * * * that funds were not spent for sectarian purposes.”⁷⁸ Where there was a “question of sectarian use,” the state was authorized to conduct an audit to determine whether a violation

the use of the aid, and even if it did, “there [was] no evidence of any ability or attempt to monitor the use of the grant money received by religious schools”).

⁷⁶ 530 U.S. at 860-61 (O’Connor, J., concurring).

⁷⁷ 426 U.S. at 762.

⁷⁸ *Id.* at 742 (internal quotations omitted).

occurred.⁷⁹ And, in *Agostini*, the teachers were subject to a series of limitations, as well as monthly monitoring by the state, to ensure that they did not venture into religious instruction.⁸⁰

While there is no constitutionally mandated recipe for what combination of safeguards is adequate to protect against diversion, it is clear that there must exist some “mechanism whereby the [state] can police the grants * * * to ensure that [state] funds are not used for impermissible purposes.”⁸¹ The TIF ordinances, however, contain *none* of the safeguards highlighted by the Supreme Court in previous cases. They provide no mechanism to ensure SLU does not adorn the City-financed arena with religious symbols, carry out its plans to hold mass there, or convert it to a church next year (let alone 20 years from now). There is no express statutory restriction, and SLU officials need not make any assurances or provide any documentation to the City regarding SLU’s use of the arena. In addition, the City has not set up any means of monitoring the use of

⁷⁹ *Id.* at 743.

⁸⁰ 521 U.S. at 211-12, 233-35; *see also Tilton*, 403 U.S. at 675 (statutory restrictions against religious use of aid were “enforced by the Office of Education primarily by way of on-site inspections”).

⁸¹ *Bowen*, 487 U.S. at 615. *See also McCallum*, 179 F. Supp. 2d at 976 (“Although it is not necessary for the safeguards to take the form of a provision within a statute, the presence of a statute prohibiting the use of public funds for religious purposes weighs in favor of finding that the funding does not have the primary effect of advancing religion.”).

the arena to prevent diversion of the aid to religious purposes. The TIF ordinances do not even approach the realm of constitutionality. Thus, they should be struck down by this Court.⁸²

III. The TIF Ordinances Violate the Missouri Constitution

The unrestricted TIF funding — even if deemed by this Court to comply with the federal Constitution — nevertheless violates the Missouri Constitution. As explained above, the state constitution is even stricter than the federal Establishment Clause with regard to the use of state aid for religious purposes, prohibiting the diversion of *any* kind of governmental aid to religious use, including aid that is provided to religious institutions only indirectly.⁸³ Although this Court has never explicitly held that safeguards must accompany governmental aid to eligible religiously affiliated institutions (i.e., those not barred from receiving aid by the religious creed provision of Article IX § 8), it makes sense that in order to prevent diversion of the aid to prohibited religious uses — just as the Establishment Clause bars unrestricted aid to universities that are not

⁸² *See, e.g., Bugher*, 249 F.3d at 613 (striking down state statute providing direct subsidies to private religious schools to increase their telecommunications access “because there [were] no statutory prohibitions or administrative enforcements in place” to prevent “sectarian use” of funds).

⁸³ *See supra*, § I(B); Mo. Const. art. I § 7; Art. IX § 8.

pervasively sectarian but nevertheless religiously affiliated⁸⁴ — the Missouri Constitution prohibits unrestricted aid to universities that, although not controlled by a religious creed, are religiously affiliated. Indeed, it is telling that, on the two occasions in which this Court upheld the provision of public funds to a religiously affiliated institution, the challenged programs contained safeguards that would help protect against diversion.

In *Menorah Medical Center v. Health & Educational Facilities Authority*,⁸⁵ this Court upheld, by a plurality vote, a traditional bond-financing plan (akin to the ones in *Virginia Building College Authority* and *Hunt*) that provided state aid to several religiously affiliated institutions, including a Jewish medical center and SLU. But as the plurality pointed out, the challenged statute explicitly excluded any aid for “property used or to be used for sectarian instruction or study or as a place for religious worship or any property used or to be used primarily in connection with any part of a program of a school or department of divinity of any religious denomination.”⁸⁶ Thus, the statute in *Menorah*, unlike the TIF ordinances, contained at least some safeguards to protect against diversion to religious uses.

And in *Americans United* — in which this Court upheld a state statute that provided tuition grants to college students at certain approved public and private universities — the statute

⁸⁴ *See supra*, § II(B)(2).

⁸⁵ 584 S.W.2d 73, 87 (Mo. 1979) (plurality opinion).

⁸⁶ *Id.* at 76.

contained a “proscription against the use of [the grant] funds for a course of study leading to a degree of theology or divinity” that “clearly evidence[d] a legislative intent that the money not be used for sectarian religious purposes.”⁸⁷ Under the statute, “the coordinating board ha[d] the obligation to promulgate regulations so as to insure that the funds [were] not used for sectarian religious purposes in conformity with the provisions of the constitutions of the United States and the State of Missouri.”⁸⁸ Thus, “it [was] quite clear under the majority opinion * * * that the coordinating board ha[d] the obligation * * * to take such steps as necessary to insure that the funds not be used for sectarian religious purposes.”⁸⁹ By contrast, here, the lack of any safeguards in the TIF ordinances renders them unconstitutional.

⁸⁷ 538 S.W.2d 711, 723 (Mo. 1976) (Bardgett, J., concurring).

⁸⁸ *Id.*

⁸⁹ *Id.*

CONCLUSION

For the foregoing reasons, *amicus* respectfully asks that the judgment here be reversed, and that the TIF funding of SLU be held unconstitutional.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this Brief of Amicus Curiae was prepared in the format of Microsoft Word using Times New Roman typeface in font size 13. This Brief contains 8,486 words of text. The accompanying diskette, containing a complete copy of this Brief of Amicus Curiae, has been scanned and found to be virus-free. The name, address, bar and telephone number of counsel for Amicus Curiae are stated herein and the Brief has been signed by the attorney of record.

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