

No. SC88075

IN THE
SUPREME COURT OF MISSOURI

SAINT LOUIS UNIVERSITY, ET AL.,

Respondents,

v.

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

Appellants.

On Transfer from the Court of Appeals

Appeal from the Circuit Court of the City of St. Louis, Missouri

The Honorable Stephen R. Ohmer

**BRIEF OF *AMICUS CURIAE* CENTER FOR LAW &
RELIGIOUS FREEDOM IN SUPPORT OF RESPONDENTS
SAINT LOUIS UNIVERSITY AND CITY OF SAINT LOUIS**

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INTERESTS OF *AMICUS CURIAE*

The Center for Law & Religious Freedom is the legal advocacy and information division of the Christian Legal Society, which is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with members in nearly every state and at over 140 accredited law schools. The Center works for the protection of religious belief and practice in state and federal courts throughout the nation. The Center strives to explore and promote a proper understanding of religious liberty *vis-à-vis* government at the local, state and federal levels. The Center believes it is a self-evident truth that all persons are divinely endowed with rights that no government may abridge nor citizen waive. Among such inalienable rights is the right of religious liberty.

STATEMENT OF THE CASE

Saint Louis University (“SLU”) and the City of St. Louis filed a declaratory judgment action in the Circuit Court of the City of St. Louis, Missouri, seeking a declaration that three City ordinances implementing tax increment financing to assist in the construction of a university sports arena do not violate various State and federal constitutional provisions. Upon motion with supporting affidavit and exhibits, the circuit court granted summary judgment for SLU and the City and entered the requested declaratory judgment. On appeal to the Court of Appeals of Missouri, Eastern District, the circuit court decision was affirmed by a divided

panel.¹ The panel was unanimous, however, that the case should be transferred to the Supreme Court of Missouri pursuant to Rule 83.02.

Saint Louis University is a Roman Catholic institution of higher education in the Jesuit tradition. SLU seeks to build a new arena for sporting events, graduation ceremonies, and concerts. It sought financial assistance from the City of St. Louis by way of tax increment financing (“TIF”). The City is authorized to act under the Real Property Tax Increment Allocation Redevelopment Act, Mo. Rev. Stat. § 99.800 *et seq.* (2000). The City adopted the ordinances to implement the TIF. With real property located in the designated “blighted” area, the Masonic Temple Association of St. Louis and others challenged the constitutionality of the TIF, as applied in these circumstances, as being contrary to the separation of church and state and, hence, in violation of MO. CONST. art. I, § 7, MO. CONST. art. IX, § 8, and the First Amendment to the U.S. Constitution.

Tax increment financing establishes a baseline for property and activity taxes in a designated TIF area in its current “blighted” condition. These taxes will increase for those in the TIF redevelopment project area, which includes for-profit and nonprofit organizations that currently pay property and/or activity taxes. The

¹ The opinion of the court of appeals is reproduced at *Saint Louis University v. The Masonic Temple Association of St. Louis*, 2006 Mo. App. LEXIS 1472 and at 2006 WL 2805606 (Oct. 3, 2006).

difference between the baseline and future taxes is pledged by the City of St. Louis to the retirement of revenue notes that fund projects in the designated area qualifying for TIF. The benefit to SLU, which would amount to about \$8 million, is restricted to construction of the sports arena. Total cost of the arena and real estate will be well in excess of that amount.

SLU's by-laws indicate governance by a mostly lay Board of Trustees consisting of 25 to 55 members, with six to 12 members required to belong to The Society of Jesus (Jesuits). Of the 42 current trustees, nine are Jesuits. Citing prior cases by the Supreme Court of Missouri,² the court of appeals noted that having an independent board of trustees strengthens the secular identity of the university. Additionally, the panel majority noted the secular purpose of the funding, namely, a new sports and entertainment arena that will help redevelop an otherwise "blighted" urban area.³

² Most relevant are *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. banc 1976), and *Menorah Medical Center v. Ashcroft*, 584 S.W.2d 73 (Mo. banc 1979) (plurality opinion).

³ *Saint Louis University v. The Masonic Temple Association of St. Louis*, 2006 Mo. App. LEXIS 1472 ** 13-16 (Oct. 3, 2006).

ARGUMENT OF *AMICUS CURIAE*

Amicus has two objectives in filing this brief, both quite straightforward.

The first is to lay out the current state of the First Amendment law under the free exercise and establishment clauses. Obviously, Missouri's constitutional provisions have to be applied in a manner that does not conflict with the federal law. The second objective is to show that MO. CONST. art. IX, § 8, can and should be read so as not to be at odds with the requirement in MO. CONST. art. I, § 7, that government not discriminate against a person or entity on account of religion. Discriminatory funding programs are the most harmful of State policies. This is because, where such discriminatory programs exist, the competition for scarce resources pressures large and complex organizations like SLU to shape their religious decisions and practices to conform to the government's preferred behaviors and categories. The resulting State involvement in religion is just the opposite of separation of church and state and is unconstitutional.

I A REVIEW OF FIRST AMENDMENT CASES IS NOT ONLY HELPFUL AS A GUIDE TO CHURCH-STATE RELATIONS GENERALLY, BUT MISSOURI'S CONSTITUTION HAS TO BE APPLIED SO AS NOT TO CONFLICT WITH THE FEDERAL LAW.

On a few occasions federal law has overridden Missouri laws dealing with church-state relations. Generally the application of the Missouri law in question

was more “strict separationist” than federal law permits. *Widmar v. Vincent*, 454 U.S. 263 (1981), is illustrative. The case involved a State university that allowed student organizations to use classroom buildings to hold their meetings. When a religious student organization sought to schedule space to conduct meetings that included worship, the university balked, citing the need for strict separation of church and state as required, in part, by the Missouri Constitution. The U.S. Supreme Court, relying on a long line of precedent that prohibits government from discriminating based on the content of one’s speech, had little trouble rejecting the State’s reliance on the Missouri Constitution as justifying discrimination against speech on account of its religious content. *Id.* at 276. The essence of the rule, of course, is that whatever “strict separationism” was thought to be required of the State university by the Missouri Constitution could not overcome the First Amendment rule that an organization’s speech cannot be the object of the State’s religious discrimination. *See also Wheeler v. Barrera*, 417 U.S. 402 (1974), *modified* 422 U.S. 1004 (1975), where the Court held that notwithstanding application of “stricter separation” requirements in the Missouri Constitution, under a federal educational program the students at parochial schools were entitled to funding and remedial services comparable to students attending public schools.

A The Establishment Clause Permits Generally Applicable Programs That Fund Organizations, Including Religious Organizations, So Long as the Aid is Not Diverted to Religious Indoctrination.

For almost a decade now, the U.S. Supreme Court has upheld educational programs of direct aid so long as the program is secular in purpose and neutrally available to a wide class of public and private schools, including religious schools. It is no longer “Who are you?” but “How are you spending the money?” that matters. Hence, it is of no consequence that the religious schools receiving the aid are “pervasively sectarian.”

After years of controversy and inconsistency over governmental aid to K-12 parochial schools, the Supreme Court adopted an approach, in *Agostini v. Felton*, 521 U.S. 203 (1997), that is now the prevailing law. Like *Wheeler v. Barrera*, the Missouri case cited above, *Agostini* involved a federal program of aid to disabled and remedial students. Under the program, participating states shared federal revenues but had to meet federal minimum guidelines. Prior case law was overruled which had prohibited the delivery of remedial services to parochial school students on the religious school campus. Instead, *Agostini* held that the establishment clause permitted the delivery of direct funding to K-12 religious schools. Three things were required: (i) the program must have a secular purpose,

(ii) the eligible schools must be from a broad, neutral array of public and private institutions, and (iii) when religious schools are the aid recipient, controls must be in place so that the aid is not diverted to religious indoctrination. The prior rule that eligible recipients could never be “pervasively sectarian” was dropped because the recipients of the aid in *Agostini* were Roman Catholic K-12 schools, schools that in the past were archetypical of a “pervasively sectarian” organization in the Court’s view.

That three-step requirement for establishment clause analysis of direct assistance programs was again relied on in *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion). Once again the schools were Roman Catholic elementary and secondary schools, and yet six of the Justices voted to uphold the aid program. The four-Justice plurality in *Mitchell* embraced without qualification the neutrality principle. In terms of positive law, however, Justice O’Connor’s separate opinion is controlling in the lower courts. *Id.* at 836 (O’Connor, J., concurring in the judgment).⁴

Based on Justice O’Connor’s opinion in *Mitchell*, joined by Justice Breyer, and combined with the four Justices comprising the plurality, it can be said that

⁴ *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when Supreme Court fails to issue a majority opinion, the opinion of the members who concurred in the judgment on narrowest grounds is controlling).

secular-purpose, direct assistance provided to a religious organization as part of a general, neutral program of aid does not violate the establishment clause. Justice O'Connor explained that by a neutral program of aid she asked "whether the aid program defines its recipients by reference to religion." *Id.* at 845. To be "neutral" in this sense an aid program must be facially nondiscriminatory with respect to religion and, where there is discretion in awarding a benefit, nondiscriminatory as applied. Having indicated that program neutrality is an important but not sufficient factor in determining the constitutionality of direct aid, Justice O'Connor went on to say that: (a) *Meek v. Pittenger*⁵ and *Wolman v. Walter*⁶ are overruled (*Mitchell*, 530 U.S. at 837, 849-55); (b) the Court must do away with all presumptions of unconstitutionality; (c) if proved, actual diversion of

⁵ *Meek v. Pittenger*, 421 U.S. 349 (1975) (plurality in part), now overruled, had struck down loans to religious schools of maps, photos, films, projectors, recorders, and lab equipment, as well as disallowing services for counseling, remedial and accelerated teaching, and psychological, speech, and hearing therapy.

⁶ *Wolman v. Walter*, 433 U.S. 229 (1977) (plurality in part), now overruled, had struck down use of public school personnel to provide guidance, remedial and therapeutic speech and hearing services away from the religious school campus, disallowed the loan of instructional materials to religious schools, and disallowed transportation for field trips by religious school students.

government funding to religious indoctrination would be a violation of the establishment clause; and (d) while adequate safeguards to prevent diversion are called for, an intrusive and pervasive monitoring of the faith-based recipient of aid would raise entanglement concerns.

Missouri's Real Property Tax Increment Allocation Redevelopment Act, Mo. Rev. Stat. § 99.800 *et seq.* (2000), complies with all these criteria. The purpose is secular, namely, using tax increment financing to facilitate urban redevelopment. Tax increment financing is available to a broad class of potential beneficiaries, for-profit and nonprofit, secular and religious. The transfer of any financial assistance is documented and properly accounted for such that any diversion to inherently religious observances would be discovered and corrected.

The federal program in *Mitchell* entailed aid to K-12 schools, public and private, secular and religious, allocated on a per-student basis. The same principles presumably apply to social services, health care, and urban redevelopment programs, particularly in view of the fact that historically the U.S. Supreme Court has scrutinized far more closely direct aid to K-12 schools compared to, for example, social welfare and health care programs.⁷

⁷ See *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding, on its face, religiously neutral funding of teenage sexuality counseling centers); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding use of federal funds for construction at a religious

In *Mitchell*, Justice O’Connor announced that she would follow the analysis first used in *Agostini v. Felton*. 530 U.S. at 837, 844-45. She began with the two-prong *Lemon*⁸ test as modified in *Agostini*: is there a secular purpose and is the primary effect to advance religion? Since the *Mitchell* plaintiffs did not contend that the federal educational program failed to have a secular purpose, she moved on to the second part of the *Agostini/Lemon* test.⁹ Drawing on *Agostini*, Justice O’Connor noted that the primary-effect prong is guided by three criteria. The first two inquiries are whether the government aid is actually diverted to the indoctrination of religion and whether the program of aid is neutral with respect to religion. *Id.* at 845. The third criterion is whether the program creates excessive

hospital). In sharp contrast, the Court has been “particularly vigilant” in monitoring compliance with the establishment clause in K-12 schools, where the government exerts “great authority and coercive power” over students through a mandatory attendance requirement. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

⁸ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁹ The secular-purpose prong of the test is easily satisfied. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (“a court may invalidate a statute only if it is motivated wholly by an impermissible purpose”).

administrative entanglement,¹⁰ now downgraded to just one more factor to weigh under the primary-effect prong.

After outlining the Court's *Agostini/Lemon* approach, Justice O'Connor inquired into whether program eligibility was religiously neutral, and whether any aid that was actually diverted was diverted in a manner attributable to the government. *Id.* at 838-39, 847-49. Because the federal K-12 educational funding program under review in *Mitchell* was facially neutral, and administered evenhandedly as to religion, she spent most of her analysis on the remaining factor, namely, diversion of program assistance to religious indoctrination. Justice O'Connor noted that the educational aid in question was, by the terms of the statute, required to supplement rather than to supplant monies received from other sources, that the nature of the aid was such that it could not reach the "coffers" of places for religious inculcation, and that the use of the aid was statutorily restricted to "secular, neutral, and nonideological" purposes. *Id.* at 848-49.

Justice O'Connor proceeded to reject a rule of unconstitutionality where the character of the aid is merely capable of diversion to religious indoctrination, hence overruling *Meek* and *Wolman*. *Id.* at 849-60. Justice O'Connor thus

¹⁰ In *Mitchell*, plaintiffs did not contend that the program created excessive administrative entanglement. 530 U.S. at 845. Prior to *Agostini*, entanglement analysis was a separate, third prong to the *Lemon* test.

rejected employing presumptions of unconstitutionality and indicated that henceforth she would require proof that the government aid was actually diverted to indoctrination.¹¹ Because the “pervasively sectarian” test is such a presumption, indeed, an irrebutable presumption (*i.e.*, any direct aid to a highly religious organization is deemed to advance sectarian indoctrination),¹² Justice O’Connor

¹¹ Justice O’Connor’s statement sidelining future reliance on presumptions that employees of highly religious organizations cannot or will not follow legal restraints on the expenditure of government funds is as follows:

I believe that our definitive rejection of [the] presumption [in *Agostini*] also stood for--or at least strongly pointed to--the broader proposition that such presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause.

Id. at 857-58.

¹² *See id.* at 847 (noting that *Agostini* rejected a presumption drawn from *Meek*); *id.* at 851 (quoting from *Meek* the “pervasively sectarian” rationale and noting it created an irrebutable presumption which Justice O’Connor later rejects); *id.* at 857-58 (requiring proof of actual diversion, thus rendering “pervasively sectarian” test irrelevant); *id.* at 859 (rejecting presumption that teachers employed by religious schools cannot follow statutory requirement that aid be use only for

thus rendered the “pervasively sectarian” test no longer applicable when assessing general, neutral programs of aid.¹³

In *Mitchell*, Justice O’Connor required that no government funds be diverted to “religious indoctrination.” Thus religious organizations receiving direct funding must separate their government-funded program (here, the SLU arena) from their inherently religious practices. *Id.* at 859-60. If the TIF assistance is utilized for urban renewal via a new arena without attendant religion indoctrination, then there is no establishment clause problem. However, if the aid flows into the entirety of a school’s program, where education and indoctrination are mixed, and some “religious indoctrination [is] taking place therein,” then the indoctrination “would be directly attributable to the government.” *Id.* at 860. Hence, if any part of a religious recipient’s activity involves “religious indoctrination,” such activities

secular purposes); and *id.* at 863-64 (rejecting presumption of bad faith on the part of religious school officials).

¹³ While Justice O’Connor did not join in the plurality’s denunciation of the “pervasively sectarian” doctrine as anti-Catholic, her opinion made plain that the doctrine has lost all relevance. Thus, while not taking issue with the plurality’s condemnation of the doctrine as bigoted, she in fact explicitly joined in overruling the specific portions of *Meek* that set forth the operative core of the “pervasively sectarian” concept. *Id.* at 850.

must merely be set apart from the government-funded program and, hence, be privately funded.

Justice O'Connor said that various diversion-prevention factors (such as the aid supplementing/not-supplanting, the aid not reaching church "coffers," and the aid being in-kind rather than monetary) are not talismanic. She made a point not to elevate them to the level of constitutional requirements.¹⁴ Rather, the effectiveness of these diversion-prevention factors, and other devices doing this preventative task, are to be sifted and weighed given the overall context of, and experience with, the government's program.¹⁵

In addition to teaching that Missouri's Real Property Tax Increment Allocation Redevelopment Act meets with Justice O'Connor's test of neutrality, *Mitchell* serves as a warning against reading into the Missouri Constitution the

¹⁴ *Id.* at 867 ("[r]egardless of whether these factors are constitutional requirements ...").

¹⁵ Cash payments are just a factor to consider, not controlling. This makes sense given Justice O'Connor's concurring opinion in *Bowen v. Kendrick*, wherein she joined in approving cash grants to religious organizations, even in the particularly "sensitive" area of teenage sexual behavior, as long as there is no actual "use of public funds to promote religious doctrines." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring).

now discredited “pervasively sectarian” test. In his dissent below, Judge Mooney of the court of appeals proposed just such a test. In construing MO. CONST. art. IX, § 8, Judge Mooney proposed that the civil courts develop a probing evidentiary record that:

[J]udged whether an institution was sectarian by considering all the facts and circumstances, such as the location of the institution on property owned by a religious sect, the housing of members of a religious order within the institution, the adherence to religious doctrine, the display of religious emblems, the role of members of religious orders within the institution, the conduct of religious services, the provision of religious instruction, the religious affiliation of the teaching staff and the student body, and the observance of religious holidays.¹⁶

This suggested intrusion of State courts into wholly religious matters, actions, and events, and requiring State courts to weigh religious significance is, with due respect, offensive to the Constitution. In *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6 (1981), the Supreme Court warned that inquiries by judges into the significance of religious words or events are prohibited by the First Amendment’s guarantee of

¹⁶ *Saint Louis University v. The Masonic Temple Association of St. Louis*, 2006 Mo. App. LEXIS 1472 ** 23-24 (Oct. 3, 2006).

church-state separation. The plurality in *Mitchell* reacted even more strongly to the “pervasively sectarian” test:

[T]he inquiry into the recipient’s religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs. . . . Yet that is just what this factor requires In addition, and related, the application of the “pervasively sectarian” factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity. . . .

Finally, hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow. . . . Opposition to aid to “sectarian” schools acquired prominence in the 1870’s with Congress’ consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general

. . . This doctrine, born of bigotry, should be buried now.

Mitchell, 530 U.S. at 828-29 (citations omitted).

The Missouri Constitution must be interpreted so as to not conflict with federal law, including the First Amendment. The suggestion of the dissent in the Court of Appeals is a “pervasively sectarian” test that does just that and must be avoided.

B The Free Exercise Clause Prohibits the Government From Enforcing a Restriction That Purposefully Discriminates Against Religion, Religious Practice, or Against an Individual or Organization on Account of Religion.

The basic rule of the free exercise clause of the First Amendment is that the government may not “impose special disabilities on the basis of religious views or religious status.” *Employment Div. of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *see also McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (striking down state constitutional provision that disqualified clergy from seeking public office).

Although the Court in *Smith* held that neutral, generally applicable laws are not typically subject to strict scrutiny, both the majority and dissenting Justices in *Smith* agreed that a state’s facially religious discrimination is presumptively unconstitutional. 494 U.S. at 877; *id.* at 894 (O’Connor, J., concurring in judgment); *id.* at 909 (Blackmun, J., dissenting). As the Court unanimously held in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), the “minimum requirement of neutrality is that a law not discriminate on its face.”

Thus, laws that intentionally discriminate against religion “must undergo the most rigorous of scrutiny”; they “must advance interests of the highest order, and must be narrowly tailored in pursuit of those interests.” *Id.* at 546 (quotations omitted).

In a refinement of the basic rule of the free exercise clause, the Court in *Locke v. Davey*, 540 U.S. 712 (2004), confronted an unusual situation in the State of Washington. The state awarded Promise Scholarships to its high school graduates based on academic merit. The scholarships could be used at any institution of higher education in the state, public or private, including private religious colleges. A Promise Scholarship could be used to pursue any program except for a degree in “devotional theology.” This one very narrow exception was justified by the state in reliance on the state’s constitution. The U.S. Supreme Court began by expressly reaffirming *Church of Lukumi*. *See id.* at 720-21. The Court next noted that the ordinary “presumption of unconstitutionality” did not apply when the government was not in fact discriminating between similarly situated religious and nonreligious persons. *Id.* at 721-25. The Court stated how *Locke* was unique in this way: “training for religious professions and training for secular professions are not fungible. Training someone to lead a [church] congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling.” *Id.* at 721.

The Court thus reasoned that comparing college training for clerical ordination to college training for a secular vocation is not comparing apples to apples. And because “[t]he State ha[d] merely chosen not to fund a distinct category of instruction,” the Court held that “deal[ing] differently with religious education for the ministry than with education for other callings” was “not evidence of hostility toward religion.” *Id.* at 712, 721. Rather, the fact that the scholarship “exclude[ed] only the ministry from receiving state dollars reinforced [the Court’s] conclusion that [clerical] instruction [was] of a different ilk.” *Id.* at 723.

While the First Amendment establishment clause did not require the state to withhold the scholarship from divinity students (*id.* at 719), the Court said the state could do so given the ancient origins of many state’s having legislation that treat clergy as *sui generis* for church-state reasons. *Id.* at 722-23. Moreover, the exception is narrow: students could attend a religious college or university, including a “pervasively sectarian” school (*id.* at 724), and one could take classes in theology or religious studies (*id.* at 724-25). The only restriction on the scholarship was it could not be used to seek a degree in theology.

If, as a result of Missouri’s Constitution, the benefits of the State’s Real Property Tax Increment Allocation Redevelopment Act were available to all individuals and all organizations except religious schools, it is difficult if not

impossible to see how that discrimination could survive strict scrutiny. The *Locke* exception to the free exercise rule of *Church of Lukumi* prohibiting religious discrimination does not compare to a TIF involving the SLU arena. The training of young people for the clergy is inherently religious. *Id.* at 721 (“akin to a religious calling”). The construction of a general purpose sports arena, used by the community as well as SLU students and faculty, with a real effect on urban redevelopment in mid-town City of St. Louis is not—by any stretch of the imagination—inherently religious.

II MO. CONST. ART. IX, § 8, CAN AND SHOULD BE READ AS CONSISTENT WITH THE REQUIREMENT OF MO. CONST. ART. I, § 7, THAT GOVERNMENT NOT DISCRIMINATE AGAINST A PERSON OR ENTITY ON ACCOUNT OF RELIGION.

Missouri’s constitutional provisions on church-state relations are more particularized than those of the Frist Amendment. *Oliver v. State Tax Commission*, 37 S.W.3d 243, 251 (Mo. banc 2001) (“It is true . . . that the Missouri Constitution deals with separation of church and state with greater particularity than the United States Constitution.”). Moreover, there is frequent dictum to the effect that the Missouri Constitution is more restrictive than the federal establishment clause when it comes to government financial aid. *See, e.g., Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. banc 1997). This caused the panel majority in the court of

appeals to reason that if the TIF involving SLU was acceptable under the Missouri Constitution it would necessarily pass scrutiny under the establishment clause of the First Amendment.¹⁷ However, instances where the Missouri Constitution has been applied to actually strike down aid that would be permitted by the establishment clause are few. *See, e.g., McVey v. Hawkins*, 258 S.W.2d 927 (Mo. banc 1953) (busing for parochial schools); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. banc 1974) (secular textbooks for parochial schools).

Whether the Missouri Constitution is not just more particularized but in certain instances more “separatist” than the establishment clause of the First Amendment is a question that need not be resolved here. Clearly the North Star for navigating relations between church and state in the Missouri Constitution is not hostility but neutrality, not only neutrality as among religious groups, but neutrality as between those who practice religion and those who do not. This Court said as much in *Oliver v. State Tax Commission*, 37 S.W.3d 243 (Mo. banc 2001), with respect to the interplay between the First Amendment and MO. CONST. art. I, § 7:

The relationship of the Missouri constitutional provisions to religious freedom and religious discrimination was explored in *Widmar v. Vincent*,

¹⁷ *Saint Louis University v. The Masonic Temple Association of St. Louis*, 2006 Mo. App. LEXIS 1472 *16 (Oct. 3, 2006).

454 U.S. 263 . . . (1981), which may provide First Amendment guidance to interpreting the Missouri Constitution. . . . The [*Widmar*] Court went on to hold that the university’s regulation violated the principle that such regulation must be “content-neutral.” *Id.* at 275-76

. . . [T]he overriding requirement of the federal constitution is that the religious organization not be discriminated against on the basis of the content of its activities, and in this case the Missouri Constitution is consistent with this principle. State activities and religious beliefs will occasionally intersect Rather than being able . . . to purge any incidental support that religious adherents might receive on a nondiscriminatory basis, the best that can be achieved in the context of this case is strict neutrality of the state as to those who express a belief in God and those who do not.

37 S.W.3d at 251-52 (footnote omitted) (upholding non-mandatory theistic oath).

This case involves the interpretation of both MO. CONST. art. I, § 7 and MO. CONST. art. IX, § 8. Article I is Missouri’s Bill of Rights. Article IX is on the subject of education. These are complex constitutional sections with multiple clauses each with their own prohibition on the activities of State and local government. Where the two sections overlap—such as with regard to broadly available State programs of financial assistance—care must be taken so as not to

put the sections in Article IX at odds with those of Article I. These dual restraints on government must be read harmoniously, as well as not to conflict with the demands of the First Amendment. Accordingly, it is useful to first look at these two constitutional sections in their entirety (to get their full context) and then to parse them into clauses as relevant to the present set of facts. Article I, § 7, in its entirety, reads as follows:

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 in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

There are two relevant clauses or restraints on government in § 7: one addresses government aid to religion and the other the government's duty not to discriminate on account of religion. The first § 7 restraint—one of no aid directed to religion—reads in relevant part:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any . . . denomination of religion . . . as such.

The second § 7 restraint—one of nondiscrimination on account of religion—reads in relevant part:

That . . . no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Article IX, § 8, in its entirety, reads as follows:

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.

The specific § 8 restraint of interest—one of no aid to educational institutions controlled by religion—provides in relevant part:

[No] city . . . shall . . . help to support or sustain any private . . . university . . . controlled by any religious creed, church or sectarian denomination whatever.

Just as the free exercise clause of the First Amendment prohibits government from intentional discrimination against an organization on account of religion (*Employment Div. of Oregon v. Smith* and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, discussed above), so does the second § 7 restraint—one of nondiscrimination on account of religion—prohibit government from intentional discrimination on the basis of religion. This fundamental rule also aligns with the admonition in *Oliver*, 37 S.W.3d at 251, that using neutrality as the guiding principle means Missouri’s “constitution cannot be read as being hostile to any particular religion or to religion in general.”

The § 8 restraint—one of no aid to educational institutions controlled by religion—can and should be read as consistent with § 7’s rule of nondiscrimination on account of religion. The way to align these two restraints is to construe § 8 as prohibiting a law that by its terms is intended to aid educational institutions controlled by a religion. Concomitantly, § 8 would not prohibit general legislative programs of aid to assist organizations in health care, education, urban renewal, and the like, that are neutral with respect to religion. Such legislation, in its application, would be inclusive of religious organizations because to not include religious institutions as among the eligible organizations for a general program of aid would be to intentionally discriminate on account of religion.

It follows that what really matters in a general program of aid with a secular purpose—be it for education, health care, social services, or urban redevelopment—is not the nature of the eligible recipient but what the recipient is actually doing with the aid. If the aid program is for education, it must be used for education. If for health care, it must be used for health care. Many hospitals in this State are religion-affiliated, yet their government funding is unquestioned because the aid is used for health care. So long as SLU uses the aid in accord with the objectives of Missouri’s Real Property Tax Increment Allocation Redevelopment Act—that is, redevelopment of a blighted neighborhood—Art. IX, § 8 is not violated. On these facts, there is every indication the City of St. Louis will receive its full secular value from the SLU arena in return for the TIF. Missouri’s Constitution requires no more.

This harmonizing reading of § 7 and § 8 reaches the same result that was finally arrived at by the U.S. Supreme Court—after years of confusing and sometimes contradictory results—first in *Agostini v. Felton*, 521 U.S. 203 (1997), and then in *Mitchell v. Helms*, 530 U.S. 793 (2000), as discussed above.

As this case was presented below, the central focus was thought to be whether SLU is a university controlled by a religious creed, church or sectarian denomination. To be “controlled by a religious creed,” wrote the court of appeals, must mean more than “simply any religiously affiliated institution.” It must

indicate, thought the panel majority, that the institution “inculcate[s] a doctrine and faith of a denomination” as opposed to “an institution that merely identif[ies] with a religious heritage.”¹⁸

With all due respect, this is not the right approach to these constitutional provisions. Why should not SLU be as religious (or nonreligious) as determined and thought best by the Jesuits and the Board of Trustees? Why should not SLU teach the Roman Catholic faith (or not) as desired by its Trustees, the Jesuits, the faculty, and in accord with the needs and interests of the students who enroll in its degree programs? These are religious judgments and decisions not to be controlled by the State. When the laws of Missouri fundamentally shape the religious behavior of a Jesuit university by extending or withholding monetary aid, then the State has become a puppeteer with strings that determine whether the puppet is more or less religious, shaping just how SLU’s manifestations of its Christian faith should look, speak, and act.

Universities are complex organizations. So are hospitals. So are nursing homes, homeless shelters, halfway houses, drug rehabilitation centers, and domestic violence shelters. They all need money, and for nearly all of these sizable, complex organizations meeting their fiscal needs necessarily entails some

¹⁸ *Saint Louis University v. The Masonic Temple Association of St. Louis*, 2006 Mo. App. LEXIS 1472 *15 (Oct. 3, 2006).

public money to supplement their private resources. We have not had a watchman State for decades; we have an affirmative State that is deeply involved in the people's welfare, be it health care, education, or renewing the urban environment. Complex private-sector but public-serving organizations that are entirely privately funded no longer exist. In a modern State, the actual one in which we live, discriminatory funding programs are the worst possible of governmental policies. This is because the competition for scarce tax resources pressures citizens and the organizations they have created to adapt their own religious choices to the State's favored behaviors. That makes discriminatory funding an engine of secularization, no less damaging to religious freedom because of the absence of malice.

Real separation of church and state mandates keeping the State of Missouri out of the business of regulating and shaping religious decisions by religious officials. Keeping the State, especially its courts, from becoming entangled in determining which organizations are "secular enough" to be eligible for aid and which are "too religious" to fund is unconstitutional. Generally available programs of public assistance, neutral with respect to the character of the many eligible recipients—be they pervasively religious, a little religious, or nonreligious—will keep Caesar out of God's business. And that is good for both Caesar and for safeguarding the people's religious freedom.

CONCLUSION

For the reasons set forth above, *amicus* Center for Law & Religious Freedom respectfully requests that the Court affirm the summary judgment below and declare that the TIF authorized by the City of St. Louis, as applied to the facts of the SLU sports arena, does not violate either MO. CONST. art. I, § 7, MO. CONST. art. IX, § 8, or the First Amendment to the U.S. Constitution.

RESPECTFULLY SUBMITTED this 14th day of December, 2006.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Timothy Belz, attorney of record for *Amicus Curiae* Center for Law & Religious Freedom, certifies that

1. This brief contains the information required by Rule 55.03;
2. This brief complies with the limitations contained in Rule 84.06(b);
3. This brief, excluding the cover page, certificate of service, this certificate and signature blocks, contains 6,783 words, as determined by the word count tool contained in Microsoft Word 2000 software with which this brief was prepared; and
4. The diskette accompanying this brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

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