

**IN THE SUPREME COURT OF MISSOURI**

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Appeal No. SC88075

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SAINT LOUIS UNIVERSITY, ET AL.,  
Respondents

v.

THE MASONIC TEMPLE ASSOCIATION OF ST. LOUIS, et al.,  
Appellants.

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Appeal from the Circuit Court of the City of St. Louis, State of Missouri  
The Honorable Steven Ohmer, Circuit Judge

Transfer from the Missouri Court of Appeals, Eastern District, No. ED 86804

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**SUBSTITUTE BRIEF OF APPELLANTS**  
**THE MASONIC TEMPLE ASSOCIATION, et al.**

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## **JURISDICTIONAL STATEMENT**

This appeal involves a challenge by appellants to the constitutionality of certain TIF ordinances of the City of St. Louis. Appellants' challenge is to the facial validity of the ordinances as well as to the manner of their implementation.

Under Mo Const. Art. 5, Sec. 3, jurisdiction of this appeal was originally in the Court of Appeals, in that the legislative provisions in the case-at-bar involve municipal ordinances, rather than state statutes which would be within the original jurisdiction of the Supreme Court.

*Alumex Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 912 (Mo. 1997) modified on denial of rehearing, transferred to 959 S.W.2d 836, impliedly overruling prior cases to the contrary, held directly that original jurisdiction in cases involving the validity of municipal ordinances was in the Court of Appeals. Accordingly, the appeal was first brought to the Missouri Court of Appeals, Eastern District.

On October 3, 2006, the Missouri Court of Appeals, Eastern District, on its own Motion, pursuant of Mo. Civ. Rule 83.02, transferred this case after opinion to the Supreme Court of Missouri, on the basis of the general interest and importance of the case. This was with the concurrence of all three participating judges, two of whom indicated that they would have upheld the trial court, and one indicating that he would have reversed the trial court.

Therefore, this Court has jurisdiction pursuant to said Rule 83.02 and Mo. Const. Art. 5, Sec. 5, and RSMo 477.010 and RSMo. 506.080, authorizing the Supreme Court to establish rules of practice and procedure and to promote the orderly administration of justice.

### **STATEMENT OF FACTS**

(References: "L. F". refers to the Legal File. "Vol." refers to the exhibits which are in six color-coded volumes. Vols. I and IA in red, Vol. II in orange, Vol. III in yellow, Vol. IV in Green, Vol. V in blue and Vol. VI in white. Exhibits in each volume

are lettered consecutively, starting with “A”, except for those exhibits already in the record.)

### **Procedural History**

On November 3, 2004, Saint Louis University, a corporation, a Jesuit University in the City of St. Louis (hereinafter called “SLU”), filed this suit in the Circuit Court of the City of St. Louis, for a declaratory judgment declaring that certain TIF ordinances enacted by the City of St. Louis are constitutional. (L.F. 21). SLU designated as defendants, the City of St. Louis, Missouri, a municipal corporation, (hereinafter called City), The Masonic Temple Association of St. Louis, a corporation owning and operating a Masonic Temple for the benefit of certain bodies meeting therein (hereinafter called Temple), Urban Design Forum, Inc., a corporation, Barbara Arras, Janese Henry, Jo Ann Keeney and Frederick Medler, (who, since they take the same position in this litigation as Temple, will be called, along with Temple, the “Temple Parties”) (L.F. 21-22). Jeremiah Nixon, the Missouri Attorney General, was added as a notice party defendant. To this point, the said Attorney General has not been taking an active role in the case (L.F. 22).

Prior to this SLU suit, Temple Parties had brought a declaratory judgment suit against City (and certain other Defendants) seeking a declaration that the said TIF ordinances were unconstitutional under both United States and State of Missouri constitutional provisions, particularly the separation of church and state provisions of U.S. Const. First Amendment, and MO Const. Article 9, Sec. 8, and Article 1, Sec. 7 (L.F. 27-28, 44, 46, 47, 50). The case against the other defendants (as well as against City) included claims that Temple Parties had been deprived of their federal constitutional rights contrary to 42 U.S.C Sec. 1983 by reason of the actions of said defendants. SLU was not made a party in the Federal case until after SLU had brought this state court action.

Temple Parties in this state case filed a motion for a stay of proceedings on the grounds that the federal case was the first case filed and that it took precedence (L.F. 5). This motion was denied by the state trial court (L.F. 6) by the Court of Appeals and by the Missouri Supreme Court. Temple Parties also filed in this state court proceeding, (in the alternative to their Motion for Stay for lack of jurisdiction due to the federal suit), an Answer (L.F. 39) with Affirmative Defenses L.F. 43), a Counterclaim for a declaration of unconstitutionality of the TIF ordinances under both state (L.F. 49) and federal (L.F. 51) constitutional provisions, and a Counterclaim, joining as third party defendants, the defendants in the federal suit regarding the Section 1983 claims (L.F. 54).

The federal case was dismissed on Motion by the federal judge without prejudice on the basis of comity and abstention due to the state court proceedings (L.F. 266).

The third party defendants in this state suit regarding the Section 1983 claims brought a Motion to Dismiss for Failure to State a Cause of Action and for lack of standing of Temple Parties (L.F. 8), which was denied as to both contentions by the Trial Court (L.F. 242). This part of the case was then settled between the Temple Parties and third party defendants with a dismissal of the Sec. 1983 and related claims (L.F. 20).

City brought a Motion for Summary Judgment as to Temple Parties' Counterclaim regarding the constitutional issues (L.F. 84). SLU also brought a Motion for Summary Judgment and to Dismiss Temple Parties' Counterclaim regarding these issues (L.F. 105). Both were granted by the Trial Court (L.F. 258), this being the subject of this Appeal (L.F. 259-268).

### **The TIF Ordinances and Saint Louis University**

SLU stated in its pleadings (L.F. 24-25, para. 14) and in its affidavit of its President, Lawrence Biondi (L.F. 24-25, para. 14), regarding its plan in connection with the financing of their proposed arena, "To finance a portion of such a significant addition to the area, Saint Louis University sought the benefit

of Missouri State tax Increment Financing pursuant to the Missouri State Real Property Tax Increment Allocation Redevelopment Act (Mo. Rev. Stat. Sec. 99.800 *et seq.*) (‘Missouri TIF’).” The City of St. Louis TIF ordinances were enacted pursuant to that statute. ( Vol. II, Exh. C. p. 3, Para... 6). This Missouri Supreme Court has explained the mechanics and operation of the Missouri TIF act in considerable detail in *Tax Increment Financing Commission of Kansas City v. J.E. Dunn Construction Co., Inc.*, 781 S.W.2d 70, 73 (Mo. banc 1989).

City of St. Louis Ordinance 65703, enacted November 15, 2002, provided that Tax Increment Financing was adopted for the redevelopment area (Vol. I, Exh.. A. p. 4), said financing being described in some detail at page 10 of said ordinance as follows:

The Tax Increment Financing Allocation Redevelopment Act, as set forth in sections 99.800-99.865 RSMo., as amended (the “TIF Act”), provides for the use of the tax increment revenue stream generated within a tax increment financing redevelopment area to pay all reasonable or necessary costs incurred, estimated to be incurred, or incidental to a redevelopment plan or redevelopment projects within a redevelopment area. The City may pledge all or a portion of such tax increment revenue stream to be deposited into the special allocation fund established for a specific redevelopment area to the payment of redevelopment project costs and obligations within the redevelopment area, including the retention of funds for the payment of future redevelopment costs. Therefore, to the extent that the City pledges tax increment revenues generated by economic activity taxes (“EATS”) and payment in lieu of taxes (“PILOTS”) in the Redevelopment Area to be deposited in the special allocation fund established for the TIF Redevelopment Project (the “Special Allocation Fund”), this Redevelopment Plan proposes that

the TIF Redevelopment Costs be paid from the proceeds of TIF Obligations or on a pay-as-you-go basis.

Specifically, fifty percent (50%) of the EATS, as that term is further defined in the TIF Act, including sales taxes, restaurant gross receipts taxes, utility franchise taxes, earnings taxes, public garage and parking lots gross receipts taxes and amusements admissions taxes and one hundred percent (100%) of PILOTS, as that term is further defined in the TIF Act, generated by all economic activities and uses within the Redevelopment Area will be allocated to the Special Allocation Fund and, thereafter, pursuant to a redevelopment agreement, to the Master Developer to pay for the TIF Redevelopment Project Costs incurred in connection with the TIF Redevelopment Project. The Master Developer will in turn allocate a portion of these amounts to the “Sub Developers” who complete Redevelopment Projects . . .

The redevelopment Area, which includes SLU and its arena is described in said ordinance (Vol. I, Exh. A at page 10-11, subdivision I).

The initial amount of estimated redevelopment costs for the SLU arena was \$66,900,000. (Vol. I, Exh.. A, p. 51).

Further descriptions of the said allocation funds and university sub account and their use are found at (Vol. I, Exh.. A, p. 25; Exh.. B, pp. 5 and 9; Exh.. C, pp. 5, 9 and 18).

Ordinance 65857, enacted on February 25, 2003, amends Ordinance 65703 and explicitly adopts a proposed agreement submitted by Grand Center, Inc., to redevelop the redevelopment area established in Ordinance 65703. (Exh.. Vol. I, at Sec. B)

Ordinance 65858, also enacted on February 25, 2003, authorizes and directs the issuance and delivery of tax increment revenue notes not to exceed \$80,000.000 in

principal amount as related to the Grand Center Redevelopment project. (Exh.. Vol. I, Sec. C)

**Saint Louis University, its Nature Regarding Being a Religious Institution and Operating According to a Religious Creed and its Part in the Present Controversy**

Saint Louis University (SLU) has initiated design and construction planning for a 13,000 seat arena to be built on its campus in midtown St. Louis (L.F. 24). To finance a portion of this arena, SLU has sought the benefit of Missouri State Increment Financing pursuant to RSMo. 99.800 and St. Louis City Ordinances 65703, 65857 and 65858 (L.F. 24-25), the TIF Ordinances.

SLU is a Missouri benevolent corporation that operates a nationally-recognized academic institution, (Affidavit of Lawrence Biondi, S.J. (“Biondi Affidavit”), Exhibits to Legal File, Volume II (Exh.. Vol. II), at par. 2), its campus being located at Grand and Lindell in the City of St. Louis, with 11,000 students on its campuses in St. Louis and Madrid, Spain. (L.F. 22). The university traces its history back to 1818 when the Society of Jesus (the Jesuits) established St. Louis Academy in downtown St. Louis. It was incorporated by Act of the Missouri General Assembly in 1832 (L.F. 24, par. 12; L.F. 40, par. 12). The St. Louis campus consists of approximately 127 buildings on approximately 217 acres. (Id.)

In connection with its Motion for Summary Judgment, SLU submitted an affidavit from its President, Lawrence Biondi, which included the following statements regarding the issue of the religious nature, *vel non*, of the university (Vol. II, Exh.. C, p. 2-3, Paras. 2-5):

2. Saint Louis University is an independent Missouri benevolent corporation with a Jesuit background and operates as a nationally-recognized academic institution of higher education. Saint Louis University has a tradition

that aspires to Jesuit philosophies and ideals, but in no way requires that employees or students aspire to those ideals, be Catholic, or otherwise have any specific religious affiliation.

3. Saint Louis University is not controlled by the Roman Catholic Church or any other religious sect or creed. Rather, Saint Louis University is controlled and operated by an independent, lay board of trustees. Pursuant to Saint Louis University's by-laws, the Board of Trustees consist of no fewer than 25 members and no more than 55 members, and no fewer than six, but no more than 12 of the members of the Board shall be members of the Society of Jesus. The by-laws further provide that, in order to conduct any business on behalf of Saint Louis University, a majority of all trustees must be present at any meeting called for such purposes, and a majority of all trustees present at such meeting is required to authorize any corporate action by Saint Louis University (unless a greater vote is specified). Presently there are 42 Trustees of which nine are Jesuit. Further, of the 1,275 faculty/staff members at Saint Louis University, less than 35 are Jesuit.

4. (This paragraph outlines the growth of SLU in the City of St. Louis.)

5. In order to continue to participate in the redevelopment of Midtown St. Louis City and to improve the life, welfare and education of its students, Saint Louis University has initiated design and construction planning for a 13,000 seat arena ("Arena") to be used for sporting events, graduation ceremonies, and other purely secular uses benefiting Saint Louis University's students, the City of Saint Louis and the Metropolitan St. Louis Community.

All officers of SLU serve "at the pleasure" of the Board of Trustees. (By-Laws, Exh.. Vol. III at Art. III, Sec. 2). In his Deposition Father Biondi stated that fewer than half of the students at SLU identify themselves as Catholic. (Exh.. Vol. V, at p. 31, 11.

16-19. He also stated that the SLU Board is comprised of people of all faiths and people with no particular religious affiliation. (Exh.. Vol. V, at p. 13, 11. 15-21).

In connection with Temple Parties' responses to the Motion for Summary Judgment, their submissions included excerpts from the By-Laws of the university, the following being from "ARTICLE I PURPOSES AND ESSENTIAL PRINCIPLES OF THE UNIVERSITY" (Exh. Vol. III, Exh. C, Attachment 1, p. 1.):

St. Louis University has been operated and governed by members of the Society of Jesus and enjoys a long, rich history and tradition as a Catholic university and as a Jesuit university. Its trustees acknowledge that the corporate purposes of the University and the services to which it is dedicated will be effected, and the University's operations will be conducted, in harmony with this history and tradition, and that:

- a. The University will be publicly identified as a Catholic university and as a Jesuit university.
- c. The University will be guided by the spiritual and intellectual ideals
- d. The University, through the fulfillment of its corporate purposes, by all men and women.

Under ARTICLE III OFFICERS OF THE UNIVERSITY, is the following (Vol. III, Exh.. C Attachment 1, p. 5):

**Section 3. The President,** The President shall be a member of the Society of Jesus. He shall have the general and active management, control and direction of the business operations, educational activities and other affairs of the University.

Under ARTICLE II THE BOARD OF TRUSTEES, is the following (Vol. III, Exh. C), Attachment 1, p. 2):

The President of the University shall ex-officio be a voting member of the Board of Trustees.

Under ARTICLE I, par. 2 is the following: (Vol. III, Exh. C, Attachment 1)

The primary corporate purposes of the University, expressed in its charter, are the encouragement of learning and the extension of the means of education. In common with other American social institutions, the University is dedicated to the service of its immediate community, the service of the Nation and the service of the world at large. The University fulfills its corporate purposes and carries out these dedications by means appropriate to a university in our society, that is, through teaching and research, by the discovery, preservation and communication of knowledge. The University therefore, and its Trustees in its behalf, recognize and accept three primary responsibilities: that of teaching; that of research; and that of community service.

In the deposition of Lawrence Biondi, President of SLU, the following questions were asked and answers given (Exh. Vol. III, Exh. C, p. 27):

Q. Sir, to the best of your ability, is it safe to assume that you operate the university in accordance with the charter of St. Louis University and the by-laws of St. Louis University?

A. I must. I must do that.

Q. Thank you, sir. I will represent to you that I have copies of the by-laws here that have been presented to me by your counsel.

A. Yes.

MR. REED: Thank you.

Q. (By Mr. Stemmler) Sir, could I ask the – first of all, would you identify that as the current by-laws, and I will represent to you that that is what has been submitted to me?

A. Yes. It is.

Father Biondi was further deposed as follows:(Vol.; III, Exh.. C. p. 77-78):

Q. With all of these assets, is it really necessary for you to have this eight million dollars from the TIF?

A. Absolutely.

...

Q. Is it your opinion that the eight million is a necessity, and, if so, why?

A. Yes. It is a necessity . . . Athletics plays an important role here at St. Louis University. . . Why is an arena important? Because it's an attractive venue for students from across the United States to come to this campus to be educated in the Jesuit tradition.

## **POINTS RELIED ON**

### **Authorities Applicable to Standard of Review**

*Phillips v. CNS Corporation*, 135 S.W.3d 435, 437-8, (Mo. App. W.D. 2004).

*ITT Commercial Financial Corp.*, 854 S.W.2d 371, 376 (Mo banc 1993).

*Alumex Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. 1997).

*Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). Mo. Civ. Rule 74.04

### **Points**

#### **I**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT THAT THE TIF ORDINANCES WERE CONSTITUTIONAL UNDER MISSOURI STATE LAW, BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SAID JUDGMENT, IN THAT THE SLU BY-LAWS THEMSELVES AND THE TESTIMONY OF SLU'S PRESIDENT ESTABLISHED THAT SLU IS A UNIVERSITY UNDER THE CONTROL OF A RELIGIOUS DOCTRINE OR CREED, AND THE FACE OF THE ORDINANCES, AS WELL AS SLU'S ADMISSIONS, ESTABLISHED THAT PUBLIC FUNDS WOULD BE GOING**

**FOR THE BENEFIT OF SAID UNIVERSITY, CONTRARY TO THE MISSOURI CONSTITUTIONAL PROVISIONS.**

*Universal Underwriters Ins, Co. v. Dean Johnson Ford, Inc.* 905 S.W.2d 529, 533

(Mo. A

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

*Luckett v. Bethlehem Steel*, 618 F.2d 1373 (10 Cir. 1979)

*Paster v. Tussey*, 512 S.W.2d 97 (Mo. banc 1974), cert. den., 419 U.S. 1111, 95 S. Ct.

785, 42 L.Ed.2d 807 (1975).

Mo. Const. Art. IX, Sec. 8

Mo. Const. Art. I, Sec. 7

Mo. Rev. Stat. Sec. 99.800 *et seq.*

18 C.J.S. 408, Sec. 118

Black's Law Dictionary

Webster's Encyclopedic Unabridged Dictionary of the English Language,

Webster's Seventh New Collegiate Dictionary

**II**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT THAT THE TIF ORDINANCES WERE CONSTITUTIONAL UNDER MISSOURI STATE LAW BECAUSE IT ERRONEOUSLY DECLARED AND APPLIED THE LAW, IN THAT IT (A). ERRONEOUSLY APPLIED TO THE STATE CONSTITUTIONAL PROVISIONS , THE FEDERAL RULES AND LAW REGARDING THE FEDERAL PROVISIONS, PARTICULARLY THE RULE THAT PERMITTED ANY AID INVOLVING A SECULAR PURPOSE, AND**

**(B), ERRONEOUSLY DECLARED AND APPLIED THE STATED LAW FROM THE MISSOURI OPINION OF *MENORAH MEDICAL CENTER HEALTH & ED. FAC. A.*, WHICH WAS A THREE PERSON PLURALITY OPINION**

**FROM A PANEL OF SEVEN JUDGES, AND NOT DECLARATIVE OF THE LAW ON THE BASIS OF STATEMENTS THEREIN.**

*Americans United v. Rogers* 538 S.W.2d 711, 716 (Mo. banc 1976).

*Menorah Medical Center v. Health & Ed. Fac. A.*, 584 S.W.2d 73 (Mo. banc 1979).

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

*Moore v. Brown*, 350 Mo. 256, 265, 165 S.W.2d 657, 661 (Mo. banc 1942).

U.S. Const. Amendment One

U.S. Const. Amendment Ten

Mo. Counts Art. IX, Sec. 8

Mo. Const. Art. I, Sec. 7

RSMo. 173.205

**III.**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BASIS THAT THE TIF MONEYS USED BY SLU WOULD BE FOR SECULAR PURPOSES ONLY, BECAUSE SUCH WAS AN ERRONEOUS DECLARATION AND AN ERRONEOUS APPLICATION OF THE LAW REGARDING THE MISSOURI CONSTITUTION, IN THAT, UNDER THE MISSOURI CONSTITUTION, FINANCIAL BENEFIT TO THE RELIGIOUS INSTITUTION ALONE IS SUFFICIENT TO VIOLATE THIS STATE'S SAID CONSTITUTIONAL PROVISIONS.**

*Alumex Foils, Inc. v. City of St. Louis*, supra, 939 S.W.2d 907, 911 (Mo. 1997).

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

*Berghorn v. Reorganized School District No. 8, Franklin County, Missouri*, supra, 364 Mo. 121, 260 S.W.2d 573 (Mo. 1953).

*Paster v. Tussey*, supra 512 S.W.2d 97 (Mo. banc 1974), cert. den., 419 U.S. 1111, 95 S.

Mo. Const. Art. IX, Sec. 8

Ct. 785

**IV.**

**ALTERNATELY TO POINT I, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT THAT THE TIF ORDINANCES WERE CONSTITUTIONAL, BECAUSE, EVEN IF THERE WERE SUFFICIENT SUBMISSIONS BY RESPONDENTS TO SUPPORT A SUMMARY JUDGMENT, THESE WERE REFUTED BY FACTUAL SUBMISSIONS BY APPELLANTS, THEREBY RAISING ISSUES OF FACT FOR TRIAL, IN THAT THE SLU BY-LAWS, DEPOSITION TESTIMONY OF SLU'S PRESIDENT, AFFIDAVIT OF PHIL ESTEP, AND OTHER EVIDENCE ADEQUATELY CONSTITUTED THESE SUBMISSIONS**

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

*Rodgers v. Threlkeld*, 22 S.W.3d 706, 711-2 (Mo. App. W.D. 1999).

Mo. Const. Art. IX, Sec. 8

Mo. Const. Art. I, Sec. 7

Mo. Civ. Rule 74.04(C)(2).

**V**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT REGARDING THE FEDERAL ESTABLISHMENT CLAUSE, BECAUSE THE ISSUE OF EXCESSIVE ENTANGLEMENT REMAINED UNCHALLENGED, IN THAT TEMPLE PARTIES DULY PLEADED FACTS CONSTITUTING EXCESSIVE ENTANGLEMENT BETWEEN TAXING POWERS AND A RELIGIOUSLY CONTROLLED INSTITUTION, AND SAID ISSUE WENT UNCHALLENGED BY MOVANTS BY AFFIDAVITS OR OTHER PROPER EVIDENCE**

*Americans United v. Rogers*, supra, 538 S.W.2d 711, 716.

*Rodgers v. Threlkeld*, 22 S.W.3d 706, 711-2 (Mo. App. W.D. 1999).

*Lemon v. Kurtzman*, 403 U.S. 673 612-613, 91 S. Ct. 2105, 29 L.Ed.2d 745, (1971).

City of St. Louis Ord... 65703, p.25.

City of St. Louis Ord... 65857, p.5.

City of St. Louis Ord.. 65858, pp. 5, 9, 18.

## VI.

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT REGARDING THE FEDERAL ESTABLISHMENT CLAUSE, BECAUSE THE TRIAL COURT IGNORED AND FAILED TO APPLY THE REFINEMENT OF THE *LEMON* DOCTRINE ANNOUNCED IN *HUNT V. MCNAIR* , IN THAT, UNDER SAID REFINEMENT, A CONSTITUTIONAL VIOLATION MAY NEVERTHELESS BE PRESENT WHEN A SUBSTANTIAL PORTION OF AN INSTITUTION'S FUNCTIONS ARE SUBSUMED IN ITS RELIGIOUS MISSION, AND SUCH IS THE SITUATION IN THE CASE-AT-BAR**

*Hunt v. McNair* (1973), 413 U.S. 734 at 743, 93 S. Ct. [2868], at 2874, 37 L.Ed.2d 923.

*Americans United v. Rogers*, 538 S.W.2d 711, (Mo. banc 1976).

*Rodgers v. Threlkeld*, 22 S.W.3d 706, 711-2 (Mo. App. W.D. 1999).

Mo. Civ. Rule 55.23

## ARGUMENT

### I

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT THAT THE TIF ORDINANCES WERE CONSTITUTIONAL UNDER MISSOURI STATE LAW, BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT SAID JUDGMENT, IN THAT THE SLU BY-LAWS THEMSELVES**

**AND THE TESTIMONY OF SLU’S PRESIDENT ESTABLISHED THAT SLU IS A UNIVERSITY UNDER THE CONTROL OF A RELIGIOUS DOCTRINE OR CREED, AND THE FACE OF THE ORDINANCES, AS WELL AS SLU’S ADMISSIONS, ESTABLISHED THAT PUBLIC FUNDS WOULD BE GOING FOR THE BENEFIT OF SAID UNIVERSITY, CONTRARY TO THE MISSOURI CONSTITUTIONAL PROVISIONS.**

It is Appellants’ primary position that the Trial Judge erred in entering the summary judgment in favor of the constitutionality of the ordinances because the state of the record and undisputed evidence before the court required a finding of unconstitutionality pursuant to Missouri constitutional provisions, thereby entitling Appellants to judgment as a matter of law.

### **Standard of Review**

When considering appeals from summary judgments, the court will review the record in the light most favorable to the party against whom judgment was entered. Facts set forth by affidavit or otherwise in support of the movant’s motion are taken as true unless contradicted by the non-mover’s response to the summary judgment motion. The court accords the non-moving party the benefit of all reasonable inferences from the record.

The review is essentially de novo. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. The propriety of summary judgment is purely an issue of law. As the trial court’s judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court’s order granting summary judgment.

As the movant for summary judgment under Rule 74.04, the moving party must establish that (1) there is no genuine dispute as to the material facts on which he relies for summary judgment, and that (2) based on these undisputed facts, he is entitled to judgment as a matter of law.

The non-moving party can establish a prima facie case for summary judgment by one or more of the following three means: (1) showing facts that negate any one of the moving party's facts elements facts; (2) showing that the moving party, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of its elements; or, (3) showing that there is no genuine dispute as to the existence of each of the facts necessary to support the non-mover's properly pleaded affirmative defense. *Phillips v. CNS Corporation*, 135 S.W.3d 435, 437-8, (Mo. App. W.D. 2004); *ITT Commercial Financial Corp.*, 854 S.W.2d 371, 376 (Mo banc 1993).

The movant bears the burden of establishing both a legal right to judgment and the absence of genuine issue material fact required to support the claimed right to judgment. *ITT* at 380. A "genuine issue" exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts. *ITT* at 382. A "genuine issue" is a dispute that is real, not merely argumentative, imaginary or frivolous. *ITT* at 382.

An act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision. *State ex rel. Eagleton v. McQueen*, 378 S.W.2d 449, (Mo. banc 1964).

In construing state constitutional provisions, the appellate court applies "the plain language of the constitution", *Alumex Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. 1997).

## **Argument**

Mo. Const. Art. IX, Sec. 8 provides:

Neither the general assembly, not any county, city, township, school district, or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

Mo. Const. Art. I, Sec. 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 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.

Under Art. IX, Sec. 8, the two requirements to contravene the provision are (1), a city's appropriation of a public fund, and (2), that is in aid of a religious creed or sectarian purpose, or to help support or sustain any public or private school, academy, seminary, college, university or other institution of learning controlled by any religious creed, church, or sectarian denomination whatever.

Regarding the first such requirement, SLU's admissions in its own pleadings that it sought the TIF financing for the arena (L.F. 24-25, para. 14) as well as in the affidavit of its President (Vol. II, Exh. C, p. 3, para. 6) establish the appropriation of public funds by the city for the purpose of SLU's arena – i.e. “To finance a portion of such a significant addition to the area, Saint Louis University sought the benefit of Missouri State tax

Increment Financing pursuant to the Missouri State Real Property Tax Increment Allocation Redevelopment Act (Mo. Rev. Stat. Sec. 99.800 et seq.) (“Missouri TIF”), pursuant to which the TIF ordinances were enacted. In fact, the admissions show that it was SLU itself that was the moving force for such appropriation.

The particular enactments affecting SLU appear at (Vol. I, Exh. A, pp. 4, 10, 25; 51; Exh. B, pp. 5 and 9 and Exh. C, pp. 5, 9 and 18).

The second requirement, a university under the control of a religious creed or sectarian purpose, is met by SLU’s By-Laws and admissions of its President. The By-Laws in its Article I entitled “PURPOSES AND ESSENTIAL PRINCIPLES OF THE UNIVERSITY” require the Trustees to “acknowledge that the corporate purposes of the University and the services to which it is dedicated will be effected, and the University’s operations will be conducted, in harmony with this (Jesuit) history and tradition, and that:

- a. The University will be publicly identified as a Catholic university and as a Jesuit university.
- b. The University will be motivated by the moral, spiritual and religious inspiration and values of the Judaeo-Christian tradition
- c. The University will be guided by the spiritual and intellectual ideals of the Society of Jesus. (Vol. III, Exh. C, Attachment 1, p. 1.)

Thus, whether or not a Trustee is a Jesuit, Catholic or lay person, he or she is committed to run all the university’s operations and services according to the Jesuit spiritual ideals. Thus, Saint Louis University is clearly under the control of a religious creed.

Lawrence Biondi, the university’s President acknowledged that the university was run according to these by-laws (Vol. III, Exh. C, p. 27).

This control is also established by the fact that the by-laws require the President to be a Jesuit (Vol. III, Exh.. C, Attachment 1, p. 5), that he be ex officio a voting member

of the Board of Trustees (Vol. III, Exh. C, Attachment 1 p. 2) and that he have broad powers in the running of the university. “He shall have the general and active management, control and direction of the business operations, educational activities and other affairs of the University.” (Vol. III, Exh. C, Attachment 1, p. 5).

The fact that the present President takes these By-Laws seriously is shown not only by his statement that the university must be run according to the By-Laws, but also by his statement that he considers the new arena “an attractive venue for students from across the United States to come to this campus to be educated in the Jesuit tradition.” (Vol. III, Exh. C., p. 77-78).

There are no proper statements of facts in the Biondi affidavit that can detract from the effect of the above points. Much of what is stated in said affidavit is merely conclusionary.

Father Biondi’s statement “Saint Louis University is not controlled by the Roman Catholic Church or any other religious sect or creed” (Vol. II, Exh. C, p. 2) is a legal conclusion and involves the ultimate issue for decision in this case, and is not a statement of fact to support a Motion for Summary Judgment. *Universal Underwriters Ins, Co. v. Dean Johnson Ford, Inc.* 905 S.W.2d 529, 533 (Mo. App. W.D. 1995). “Independent” means “not subject to control”, Black’s Law Dictionary, and, thus, is the case’s ultimate issue which should be decided only by the facts determining such control. To permit a statement by an interested party to be a case’s determining factor, as Respondents would have it, is to permit such person to be judge and jury of his own case. The statement of the interested person needs to be tested at trial. *National Aviation Underwriters v. Altus*, 555 F. 2d 778, 784 (10th Cir. 1977).

Missouri courts hold similar statements to be statements of conclusions. *Scott v. Ranch Roy-L* 182 S.W.3d 627, 635 (Mo. App. E.D. 2005); *Zarebco v. Lolli Bros.*, 918 S.W.2d 931, 934 (Mo. App. W.D. 1996).

A case involving a statement regarding control, held to be conclusory, is *Luckett v. Bethlehem Steel*, 618 F. 2d 1373, (10th Cir. 1979). The affidavit stated (l.c. 1380): “. . . nor did any of the management personnel furnished by Bethlehem Steel exercise any supervisory control over the methods of work.”

The court stated at l.c. 1380, footnote 7:

Conclusory statements are insufficient to satisfy the requirements of Rule 56, F.R. Civ. P., . . . especially where the statements pertain to information known only be (sic) an adverse interested party. (Emphasis ours).

Furthermore, Father Biondi’s statement is disproved by the By-Laws and his own prior statements as shown above.

In addition, Father Biondi’s statement that “Saint Louis University is controlled by an independent, lay Board of Trustees” is mainly irrelevant. Whether the Board is lay and independent or not, the operative and important fact is that it is committed under the by-laws to run the university and educate the students in the Jesuit spiritual tradition. The Supreme Court has held in *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (banc 1942) l.c. 613, that the mere presence of a lay board does not guarantee the absence of a religious indoctrinating school. As stated in that case, “Respondents might argue that the St. Cecelia school is controlled by the school board and not by the church, but we find from the record that the nominal supervision by the school board is but an indirect means of accomplishing that which the Constitution forbids.” (163 S.W. 2d l.c. 613).

Father Biondi further states in his affidavit that the university “in no way requires that employees or students aspire to those (Jesuit) ideals, be Catholic, or otherwise have any specific religious affiliation.” (Vol. II, Exh. C, p 2). This is irrelevant as far as a violation of Mo. Const. Art. IX, Sec. 8 is concerned. The provision merely requires for a violation that the university be under the control of the creed or doctrine, not that all students be required to embrace it or identify with it. As conceded by Father Biondi

himself, a requirement for the student to embrace the religion or creed would be contrary to federal law. (Vol. III, Exh. C, p. 31). But the lack of such a requirement does not prevent Father Biondi and the Jesuits from doing all they can to instill in the students the Jesuit and Catholic doctrine and values. As shown by Biondi's above statement, that is exactly what he plans to do, as he is using the arena as an inducement to attract the students so that they can be educated in this Jesuit tradition (Vol. III, Exh. C, p. 77-78).

The use of the public funded arena as such an inducement is also a clear violation of Mo. Const. Art. I, Sec. 7, as it is a preference given to a particular sect of religion, in that the clearly expressed intent in the case-at-bar is that it be used in the furtherance of the Jesuit and Catholic religious doctrine and faith.

Prior Missouri Supreme Court law fully supports the above as shown by *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (banc 1942); *Berghorn v. Reorganized School District No. 8, Franklin County, Missouri*, 364 Mo. 121, 260 S.W.2d 573 (Mo. 1953); and *Paster v. Tussey*, 512 S.W.2d 97 (Mo. banc 1974), cert. den., 419 U.S. 1111, 95 S. Ct. 785, 42 L.Ed.2d 807 (1975). According to the above cases, any aid to a religious school for any of its operations contravenes the constitutional provisions whether the aid was religiously oriented or not. For instance, the aid in *Paster* was for non-religious textbooks. It was stated in that case at 512 S.W. 2d l.c. 101, "[T]hat it is the unqualified policy of the State of Missouri that no public funds or properties, either directly or indirectly, be used to support or sustain any school affected by religious influences or teachings or by any sectarian or religious beliefs . . ."

Thus, it is the support of the school that is the violation, not whether or not the particular appropriation is used for a secular purpose.

In the case-at-bar, the Court of Appeals' majority (as did the trial judge L.F. 251) sought to avoid the controlling effect of the above Missouri Supreme court cases by stating: "The Court in both *Paster* and *Harfst* considered the constitutionality of state aid to private elementary and secondary schools, not a university like the one at issue here."

(Opinion, p. 7, Appndx. 26A). In so stating, the said majority completely ignored this Supreme Court’s holding in *Americans United v. Rogers*, 538 S.W.2d 711, 720 (Mo banc 1976) that the Missouri Constitution “prohibits adoption of a different standard for schools of higher education from that applied to elementary-secondary, schools.”

**The New York case of *College of New Rochelle v. Nyquist* 326 N.Y.S. 2d 765, 37 A.D.2d 461 (A.D. 1971), relied on by the majority, is inapplicable here.**

The Court of Appeals’ majority’s reliance on *College of New Rochelle v. Nyquist*, 326 N.Y.S.2d 765, 37 A.D. 2d 461 (A.D. 1971) is misplaced. As pointed out by the Missouri Eastern District’s dissenting judge, Judge Mooney, the New York provision differs from the Missouri provision. The New York provision, Art. IX, Sec. 3 prohibits public funds from going to any school “under the control or direction of any religious denomination”. Missouri’s Art. IX, Sec. 8, prohibits said aid from going to any “university . . . controlled by a religious creed . . .” (as well as by a denomination). A creed is necessarily different from a denomination.

The term “creed” is defined in Webster’s Encyclopedic Unabridged Dictionary of the English Language, Gramercy Books, New York: 1994, as follows:

Creed, n. . . . 3. any formula of religious belief, as of a denomination. 4. an accepted system of religious belief. 5. any system of belief or of opinion...

According to the above, “creed” must not be too narrowly defined and mistaken for a religious denomination.

A denomination is the religious body itself. Webster’s Seventh New Collegiate Dictionary.

Both “creed” and “denomination” are used in said Art. IX, Sec. 8. It is not assumed that the enactors of the provision inserted a useless phrase or word one that meant exactly the same as another phrase or word, since every word in a constitutional provision is

presumed to have effect and meaning. with no meaningless surplusage. *Missourians for Tax Justice Ed. v. Holden*, 959 S.W.2d 100, 106 (Mo. banc 1997). .

Appellants' pleading, par. 42 (L.F. 45), specifically included the allegation that SLU is "under the control of a religious creed" and also included its Mission Statement, , which states: "The mission of Saint Louis University is the pursuit of truth for the greater glory of God. 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." (L.F. 45). The pleading also stated, "The advancement of catholic religious teachings and philosophy is an integral part of the University's mission and program."

The above factual allegations were not contradicted by any of the summary judgment submissions; said submission being concerned principally with the make-up of the university's governing board.

A governing board could be fiercely independent of the sponsoring religious body but still be under the control of a religious creed if they are committed to operate under the creed.

In the case-at-bar, the Board was so committed by the University's By-Laws and Mission Statement, as shown previously. This distinguishes the case from the New York case, where the issue was whether the control was by the religious body, itself.

Because of the difference in wording in the Missouri and New York constitutional provisions, and because this Supreme Court has previously made it clear that the courts are to apply "the plain language" of the Missouri constitution, *Alumex Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. 1997), several of the other pronouncements of the Court of Appeals' two judge majority have no real basis in law under the facts of this

case. Said majority states that Saint Louis University is only “tangentially related to a denomination”. First, this ignores the fact that Missouri’s constitutional provision includes the word “creed” and the fact that Temple Parties rely on the fact that SLU operates under a religious “creed” as well as “denomination”. Second, to assert this (tangentially related) proposition as an undisputed fact in the case-at-bar is not only an insupportable inference in support of movant, Saint Louis University, but it goes contrary to the basic rules of summary judgment in view of SLU’s worldwide identification as a Jesuit, Catholic University, whose By-Laws require that it be run as such, and Father Biondi’s assurance that the By-Laws must be followed.

Further, to refer to SLU as “an institution that merely identifies with a religious heritage” is also an unwarranted inference in favor of SLU in view of the aforesaid by-law requirements of running it according to the spiritual and intellectual ideals of the Jesuits.

As stated by dissenting Judge Mooney: “These are, after all the dictates of the university’s governing documents and not mere hollow words. Nor is this merely a matter of the University’s religious affiliation, association, or tradition. Rather, it is a matter of the University’s identity and governance.” Judge Mooney’s statement finds full support in the law. As stated at 18 C.J.S. 408, Sec. 118 concerning a corporate By-Law, “if made in conformity with the charter or governing statute, it is as binding upon the corporation and the individual members as any public law of the state.” As stated by our own courts, “by-laws are to be construed according to the general rules concerning contracts.” *Higginsville Memorial Post 6270 v. Benton*, 108 S.W.3d 28, 35 (Mo. App. W.D. 2003).

Finally, in the case-at-bar, the Eastern District majority states: “We instead construe Article IX, Section 8 to prohibit State aid only when an institution is controlled in such a way that religious authorities propagate and advance their religion through school operation.” First, there is no such requirement regarding propagation, etc. in the Missouri

constitution. All that is required is that the University be under the control of the particular creed, not that the control necessarily be exercised in the classroom. Second, even under the above definition, the undisputed record evidence shows that the Jesuit and Catholic doctrines are propagated through school operations and that it is the intent and commitment of the By-Laws and Father Biondi that they be so propagated. At the very least, SLU was not entitled to the inference that the majority gave it in this regard.

*New Rochelle* is also distinguishable in that there was full factual development of the case before the administrative body and upon which the decision was made. As stated by the *New Rochelle* court at 37 A.D.2d l.c. 463: “This conclusion was ‘based not on any single factor, but rather upon my understanding of the institution as a whole’.” l.c. 463. and at l.c. 467 upon “an analysis of the record, considering the totality of the circumstances, . . .” These circumstances included the fact that “[t]he college was invited, as were all such colleges, to provide answers to a pertinent questionnaire concerning the purposes, policies and governance of the college as well as its faculty, student body, curricula and programs.” 37 A.D. 2d l.c. 464.

In contrast, the case-at-bar is in the appellate courts on what Judge Mooney termed “a remarkably thin summary-judgment record focused on its presently lay-governing board.”

### **The Fallacy of the Court of Appeals Majority’s Finding of the “Independent” Board**

In a summary judgment, the moving party must establish the factual basis for its request for summary judgment *ITT Commercial Finance v. Mid Am. Marine*, 854 S.W.2d 371, 380 (Mo. banc 1993). SLU and the City, as well as the Court of Appeals majority, put their principal reliance on the following as support for their conclusion that the incontroverted evidence showed the “independence” of SLU’s governing Board of Trustees:

The Board of Trustees of St. Louis University, pursuant to its Bylaws, consists of no fewer than twenty-five (25) members and no more than fifty-five (55) members. No fewer than six (6), but no more than twelve (12) of the members of the Board shall be members of the Society of Jesus. A majority of all trustees present at such meeting is required to authorize any corporate action by St. Louis University (unless a greater vote is specified). Presently, there are forty-two (42) trustees, of which nine (9) are Jesuit. (Exh. Vol. III, Attach 1 at Art. II, Sec. 1).

We submit that this Bylaw does not constitute a factual showing justifying a conclusion that the board is “independent”. These statistics provide no information whatsoever on the religious composition of the self-styled “lay board”. The mere fact that 33 members are non-Jesuit does not establish that they are non-Catholic or non-Catholic oriented. This particular statistical composition of the Board does not, by itself, establish the independence of the Board as an undisputed fact. This is particularly true in view of the fact that the By-Laws mandate that the Trustees acknowledge that the University be operated in accordance with the Jesuit doctrine and Jesuit tradition. <sup>1</sup> (Exh. Vol. III, Exh C, Attach. 1, p. 1). As stated by Judge Mooney, “[i]t hardly seems that inferences were drawn against Saint Louis University,” as required by *ITT Commercial Finance v. Mid-America Marine Supply Corp.* 854 S.W.2d 371, 376 (Mo. banc 1993).

The Court of Appeals majority stated (page 7 of Opinion, Appndx. 26A) that “we would interpret the language ‘controlled by any religious creed’ to indicate those

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1. Compare *College of New Rochelle v. Nyquist*, supra, 326 N.Y.S. 2d 765, 37 A.D.2d 461, 467 (A.D. 1971), where it was held after an examination of a substantial evidentiary record, that the “Ursuline Nuns are not . . . controlled by religious affiliation insofar as their professional and academic activities are concerned.”

institutions that inculcate a doctrine of faith of a denomination, not those institutions that merely identify with a religious heritage.”

But Temple Parties pleaded as a fact, “[t]he advancement of catholic religious teachings and philosophy is an integral part of the University’s mission and program” (L.C. 45). This was confirmed, not disputed, by Father Biondi in his statement that the new arena would serve as an inducement for students from across the United States to come and be educated in the Jesuit tradition. (Vol. III, Exh. C., p. 77-78). Nor was the above countered by any factual submissions by Respondents.<sup>2</sup> Moreover, it was further supported by the submission of SLU’s previously referred-to By-Laws, the purpose of which was clearly to inculcate a doctrine of faith.

Because it is admitted by SLU’s President, Father Biondi, that the University is run according to the By-Laws and those By-Laws require the implementation of the Jesuit and Catholic spiritual doctrine, and because the public funded arena, itself, is an inducement for the recruitment of students for the purpose of educating them in the Jesuit tradition, the only proper conclusion in this case is that there is a violation of the Missouri Constitution.

For this reason, the case should be reversed and remanded to the trial court with instructions to enter judgment for the Appellants.

## II

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2. The fact, if true, that there is no requirement that students “aspire to said ideals, be Catholic, or otherwise have any specific religious affiliation” (L.F. 118), does not disprove the purpose to inculcate the Catholic doctrine.

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT THAT THE TIF ORDINANCES WERE CONSTITUTIONAL UNDER MISSOURI STATE LAW BECAUSE IT ERRONEOUSLY DECLARED AND APPLIED THE LAW, IN THAT IT (A). ERRONEOUSLY APPLIED TO THE STATE CONSTITUTIONAL PROVISIONS, THE FEDERAL RULES AND LAW REGARDING THE FEDERAL PROVISIONS, PARTICULARLY THE RULE THAT PERMITTED ANY AID INVOLVING A SECULAR PURPOSE, AND (B), ERRONEOUSLY DECLARED AND APPLIED THE STATED LAW FROM THE MISSOURI OPINION OF MENORAH MEDICAL CENTER HEALTH & ED. FAC. A., WHICH WAS A THREE PERSON PLURALITY OPINION FROM A PANEL OF SEVEN JUDGES, AND NOT DECLARATIVE OF THE LAW ON THE BASIS OF STATEMENTS THEREIN.**

Appellants' Point II is in the alternative and without retreat from our previous point that appellants, themselves, are entitled to a judgment from this Court, the alternative position being that the case should be remanded because of the error of the Trial Court.

### **Standard of Review**

The standard of review is the same as set out for Point 1. That the propriety of the summary judgment is purely an issue of law *Phillips v. CNS Corporation*, 135 S.W.3d 435, 437-8, (Mo. App. W.D. 2004), is especially applicable to this point. As in any Court tried case, it can be shown that the Trial Court erroneously declared or erroneously applied the law. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976).

### **Argument**

SLU's sole pleaded defense regarding the Missouri aid-to-religion constitutional provisions was "because the funds segregated for use by Saint Louis University under the ordinances for the Arena are to be used for secular purposes." (L.F. 29, 107). This pleading (SLU's paragraph 25), was admitted by the City of St. Louis without adding any additional grounds. (L.F. 36).

Although appellants strongly disagree that the use of the funds for the arena was limited to secular purposes, our point here is that such defense fails to state a good defense under the Missouri constitutional provisions, particularly Mo. Const. Art. IX, Sec. 8.

All that is necessary to constitute a violation under said Section 8 is for the public fund "to help to support or sustain" the school or university. The contribution of funds to build an arena, exclusively owned and operated by a particular university certainly helps to support and sustain that university. This is especially true when an admitted purpose of the arena is to induce new students to come and enroll. (Vol. III, Exh. C, p. 77-78). This necessary result comes from the application of "the plain language of the constitution", which is required by our Supreme Court in *Alumex Foils, Inc. v. City of St. Louis*, supra, 939 S.W.2d 907, 911 (Mo. 1997).

The trial judge in the case-at-bar fell into the error of applying the said "secular" defense urged by SLU. (L.F. 250-1). He cites two Missouri cases in support of this defense, *Americans United v. Rogers* 538 S.W.2d 711, 716 (Mo. banc 1976) and *Menorah Medical Center v. Health & Ed. Fac. A.*, 584 S.W.2d 73 (Mo. banc 1979). However, in both such cases, the court was discussing the federal establishment clause, not the state clause, particularly the federal law as set out in *Lemon v. Kurzman*, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971).

The local citation from the *Americans United* case given by the trial judge in the case-at-bar, as support for the application of the "secular" defense, was page 716. The referred-to section was preceded on said page 716 by the topic designation "Federal". On

the very next page, p. 717. the Supreme Court states “[18] Under the guidelines noted, we seek to resolve the federal question.” *Americans United v. Rogers* 538 S.W.2d l.c. 717. The Court, on said pages 716-719 proceeds to discuss the law solely according to federal law under the federal establishment clause.<sup>3</sup>

Thereafter, the Court proceeds to discuss the case from the standpoint of the Missouri state constitutional provisions, particularly Mo. Const. Art. IX, Sec. 8, at 538 S.W.2d l.c. 720. The *Americans United* court discusses said Missouri Sec. 8 on the basis of the plain meaning of the words used therein. The factual situation in that case, plus the attention given by the court to “any ... school ... university or other institution controlled by any religious creed,” etc. phrase, indicates that the decision would have been the opposite, had the facts been those of the case-at-bar. l.c. 720.

In *Americans United*, the facts were that “Payment of the award is made by individual check in the amount of the award payable solely to the student.” 538 S.W.2d l.c. 714. (Emphasis supplied). The Program was “designed and implemented for the benefit of the students, not of the institutions, and that the awards are made to the students, not the institutions,” 538 S.W.2d l.c. 720, (Emphasis supplied), “based on ‘his’ financial need, not on the need of the public or private institution which the student elects to attend.” 538 S.W.2d l.c. 720.. This is the opposite of the three previous cases cited by the court, *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (banc 1942); *Berghorn v. Reorganized School District No. 8, Franklin County, Missouri*, 364 Mo. 121, 260 S.W.2d 573 (Mo. 1953); and *Paster v. Tussey*, 512 S.W.2d 97 (Mo. banc 1974), cert. den., 419 U.S. 1111, 95 S. Ct. 785, 42 L.Ed.2d 807 (1975), which were still recognized as being

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3. That the Missouri constitutional provisions are not controlled by the law applicable to the federal establishment clause was reaffirmed by the later Supreme Court case, *Mallory v. Barrera*, 544 S.W.2d 556, 562 (Mo. banc 1976) which confirmed that the Missouri rule depended on the phrase “controlled by a sectarian denomination”, stating “we do not base our decision on First Amendment grounds, we base it on the constitution of this state” .

the law by the *Americans United* Court. 538 S.W.2d l.c. 720. In *Harfst* and *Berghorn*, the aid was directly to the schools; in *Paster*, it was to the school district.

This is also the opposite of the situation in the case-at-bar where the award is made directly to and for the benefit of SLU for the building of its solely-owned arena. This difference is determinative because the prohibition of said Sec. 8 is against any appropriation “to help or to sustain any private or public school, academy, seminary, college, university, or other institution of learning”, etc., (emphasis supplied) not against giving aid to an individual student.

This distinction between aid to the institution and direct aid to the student was more recently discussed and applied in the federal case of *Felter v. Cape Girardeau School District*, 810 F. Supp. 1062 (E.D. Mo. 1993). The court referred to the holding and language in *Americans United*, 538 S.W.2d 711, 720, in quoting “the program is designed and implemented for the benefit of the students, not of the institutions, and that the awards are made to the students, not to the institution.” The court proceeded to hold that transportation of disabled children to a public school for special training was not a violation of the Missouri Constitution, Article IX, Sec. 8, since it was a benefit solely to the child. *Felter* at 1069-70. “[T]he service would be provided to Sarah, not in any way to the parochial school” l.c. 1070. But the court pointed out that if the transportation had been to the religious school, this would have been a violation in that it would have been a financial benefit to the religious school. (l.c. 1069). In other words, it would have been an expense that the school would have had to bear.

### **“Independent Board”**

In *Americans United*, the court refers to the existence of an “independent board” as a factor in the determination of religious control. In our Point I, we state our position that the evidence fails to show that the Board was independent. Here, we suggest that, even if

the Board were considered to be independent, this still would not justify summary judgment in favor of Respondents.

Saint Louis University, in the Circuit Court and Court of Appeals, has made an unfounded attempt to extrapolate this reference to an “independent board” as a holding that presence of such a board, alone, justifies a summary judgment for SLU asserting:

It is thus the settled law of this state that an institution with a religious affiliation is not subject to the sectarian ‘control’ forbidden by Article IX, Sec. 8 if it is managed by an independent Board of Trustees, as is Saint Louis University.

This is not what this Supreme Court in *Americans United* stated. The “independent board” was merely one element according to the court’s statement which was:

The constitutional restriction is only that the institution not be “. . . controlled by any religious creed, church or sectarian denomination . . .” and the statutory provisions in question appear to dictate as much. Sec. 173.205(2)(a) requires that an “approved” school must have an “independent board”. Thus, those schools statutorily qualified would not be subject to that “control” prohibited by Article IX, Sec. 8 of the Missouri Constitution. (Emphasis ours). 538 S.W.2d at 721.

The “independent board” requirement was only one of said “statutory provisions” leading to an ultimate conclusion of absence of religious “control”. The statutory qualifications in *Americans United*, RSMo 173.205(2)(c) included approval by accrediting groups whose purpose was to insure absence of religious control in academic matters. (l.c. 721). This included a statutory requirement that “(e) Permits faculty members to select textbooks without influence or pressure by any religious or sectarian source.” (l.c. 721). Not only is there no such restriction in the ordinances in the case-at-bar, but if there were, SLU would be violative of its provisions by reason of its mandatory By-Laws of students being taught in the Jesuit and Catholic tradition.

The undeniable, obvious fact that the so-called “independent board”, is no guarantee of a non-sectarian institution, was recognized by plurality, concurring and dissenting sides in the case, other factors necessarily needing to be considered:

Under the act the coordinating board has the obligation to promulgate regulations so as to insure that the funds are not used for sectarian religious purposes in conformity with the provisions of the constitutions of the United States and the State of Missouri. (Bardgett concurrence, l.c. 723);

and,

. . . Administration of the Act by the Board will be a continuing process in light of changing conditions and an approaching new school year. Nothing here will prohibit challenges that the act is being implemented in an unconstitutional manner . (Plurality opinion, l.c. 722);

and,

The statute also requires that to be considered an “approved private institution”, the college, among other things, must be operated under the control of an “independent board”. Sec. 173.205(2)(a). But this does not mean that the college is non-sectarian. It might have a fiercely independent board which nevertheless is determined to and does operate a sectarian institution. (Seiler, Dissenting opinion, l.c. 725).

For the above reasons, the Respondents’ reliance on an “independent board” as a reason for summary judgment in their favor is unjustified. Even if the board is truly independent, this fails to guarantee that the University is free from control under a religious creed. In *Americans United*, this freedom from control was established by the provisions for the accrediting board who would assure such status, and specific safeguards written into the act itself. No such independent accrediting board or any safeguards whatsoever were in the ordinances in the case-at-bar.

*Americans United*, itself, recognized the controlling effect of *Harfst*, *Berghorn* and *Paster*, 538 S.W.2d 1.c. 720, but distinguished them on the above-mentioned basis that the financial aid in *Americans United* was directly to the students, not the institution (l.c. 720), and also on the basis that the institution could not be under the control of a religious creed because of the accrediting board whose purpose was to insure against the selection of institutions under such control, and other safeguards in the statute, itself, against such control (l. c. 721).

### **Menorah**

The other case relied on by the trial court for the application of the three prongs of the federal Lemon test was *Menorah Medical Center v. Health & Ed. Fac. A.*, 584 S.W.2d 73 (Mo. banc 1979). The opinion in *Menorah* consisted of a plurality opinion of three, with three dissents and one concurrence in result only. To rely on the federal rule set out in *Menorah* as authority was clear error by the trial judge.

As stated in *State v. Smith* 422 S.W.2d 50, 70 (Mo. banc, 1967), “the case cannot be considered as authority on the point concurred in by some but less than a majority”. “[I]ndividual statements within the opinion have no authoritative value”, *Nolte v. Wittmaier*, 977 S.W.2d 52, 59 (Mo. App. E.D. 1998). In such a case, the plurality opinion “did not overrule prior inconsistent decisions”, *Moore v. Brown*, 350 Mo. 256, 265, 165 S.W.2d 657, 661 (Mo. banc 1942). (*Moore* was a 3 + 1 + 3 plurality decision exactly as in *Menorah*).

The prior inconsistent controlling decisions were the *Harfst*, *Berghorn* and *Paster* decisions recognized as law but distinguished in *Americans United*.

Furthermore, the two-judge majority of the Court of Appeals erred in even giving consideration to *Menorah* as persuasive in connection with the religious creed issue. The “controlled by a religious creed” issue was not the basis for the *Menorah* contestants’ challenge. Said challenge was limited to the “sectarian use” issue, which is a different

part of said Art. IX, Section 8. The contestants' claim in *Menorah* was that the statutory provisions "violate church-state provisions of the Missouri Constitution because (what appellants classify as) 'public funds' are being used to aid sectarian purposes." l.c. 86. (Emphasis ours.) Religious creed was simply not an issue in *Menorah*.

SLU, itself, conceded in its Court of Appeals brief (21-23) that the Missouri clauses contain two types of restrictions; restrictions as to purposes and restrictions as to identity of recipients. *Menorah*, involving sectarian use involved purposes. The case-at-bar involves principally identity of recipient, i.e., a university under the control of a religious creed. If a university is under the control of a religious creed, there is nothing in *Menorah*, or any other Missouri case, indicating that a secular purpose removes the aid from this phrase's prohibition.

Also, as in *Americans United*, a close examination of *Menorah* shows that, even though both the federal and state constitutional provisions were involved, the plurality opinion's discussion of the federal rule was solely in connection with the federal law applicable to the federal establishment clause 584 S.W2d l.c. 86-87. This apparently was due to the fact that the contestants emphasized their church-state argument on the third prong of the Lemon test 584 S.W2d l.c. 87, the excessive entanglement issue.

At no place in the *Menorah* opinion did the court state or even indicate that the federal *Lemon* test should be applied in deciding the "plain language" of the Missouri state constitutional provisions. Any such holding would be directly contrary to *Americans United*, supra, and *Harfst*, supra, *Berghorn*, supra, and *Paster*, supra, all of which held that the constitution of Missouri, as construed by the Missouri Supreme Court, "is more 'restrictive' than the First Amendment to the United States Constitution in prohibiting expenditures of public funds in a manner tending to erode an absolute separation of church and state." *Americans United v. Rogers*, supra, 538 S.W.2d l.c. 720. This recognition has been reaffirmed as recently as 1997 in *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. banc 1997), wherein the court stated, "This Court has held 'that

the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive' than the First Amendment. *Paster v. Tussey*, 512 S.W.2d 97”.

Any holding that the State of Missouri's constitutional provisions are controlled by the cases interpreting the milder federal clause would be in derogation of U.S. Const. Amendment X, providing that the powers not given to the federal government be retained by the states. The states have every right to make a more restrictive church-state separation provision if they so desire. As stated on *Harfst v. Hoegen*, supra, 349 Mo. 808, 163 S.W.2d 609, 611 (Mo. banc 1942), “With the adoption of the Federal Bill of Rights the whole power over the subject of religion, at that time, was left exclusively to the State governments.”

In the case-at-bar, the trial court's final paragraph of the “Establishment Clause” section of its judgment makes it clear that the federal *Lemon* rule was applied independently of, without any application of, and disregarding the plain words of the Missouri constitutional provisions, as only federal law is there cited (L.F. 251). For these reasons, the court erred, entitling Appellants to judgment as requested in Point I, or to a new trial on remand.

### III.

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BASIS THAT THE TIF MONEYS USED BY SLU WOULD BE FOR SECULAR PURPOSES ONLY, BECAUSE SUCH WAS AN ERRONEOUS DECLARATION AND AN ERRONEOUS APPLICATION OF THE LAW REGARDING THE MISSOURI CONSTITUTION, IN THAT, UNDER THE**

**MISSOURI CONSTITUTION, FINANCIAL BENEFIT TO THE RELIGIOUS INSTITUTION ALONE IS SUFFICIENT TO VIOLATE THIS STATE’S SAID CONSTITUTIONAL PROVISIONS.**

Again, in the alternative to Point I, besides the error of applying the incorrect federal rule as stated in Point II, the Trial Court further erred in failing to apply the correct rule of financial benefit to the religiously controlled institution, as applied in the *Harfst*, *Berghorn* and *Paster* cases, *supra*.

The standard of review is the same as in Points I and II.

Again, Missouri courts construe Missouri constitutional provisions by applying “the plain language” of the particular Missouri constitutional provision, *Alumex Foils, Inc. v. City of St. Louis*, *supra*, 939 S.W.2d 907, 911 (Mo. 1997).

As previously stated *Harfst v. Hoegen*, *supra*, 349 Mo. 808, 163 S.W.2d 609 (banc 1942); *Berghorn v. Reorganized School District No. 8, Franklin County, Missouri*, *supra*, 364 Mo. 121, 260 S.W.2d 573 (Mo. 1953); and *Paster v. Tussey*, *supra* 512 S.W.2d 97 (Mo. banc 1974), cert. den., 419 U.S. 1111, 95 S. Ct. 785, 42 L.Ed.2d 807 (1975) have established the law in Missouri by applying the plain language of Mo. Const. Art. IX, Sec. 8 and Mo. Const. Art. I, Sec. 7, and requiring only that there be financial benefit to the religiously controlled institution from a public fund, in order to be violative of the Missouri Constitution.

The trial judge basically ignored the plain provisions of the said Missouri constitutional provisions. He ignored the *Harfst*, *Berghorn* and *Paster* cases which declared and applied the law applicable hereto.

It is submitted that this was error, requiring a reversal.

**IV.**

**ALTERNATELY TO POINT I, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT THAT THE TIF ORDINANCES WERE**

**CONSTITUTIONAL, BECAUSE, EVEN IF THERE WERE SUFFICIENT SUBMISSIONS BY RESPONDENTS TO SUPPORT A SUMMARY JUDGMENT, THESE WERE REFUTED BY FACTUAL SUBMISSIONS BY APPELLANTS, THEREBY RAISING ISSUES OF FACT FOR TRIAL, IN THAT THE SLU BY-LAWS, DEPOSITION TESTIMONY OF SLU'S PRESIDENT, AFFIDAVIT OF PHIL ESTEP, AND OTHER EVIDENCE ADEQUATELY CONSTITUTED THESE SUBMISSIONS.**

Appellants' Point IV is in the alternative and, again, without retreat from our Point I that Appellants are entitled to a judgment from this Court.

The standard of review is as in Points I and II.

In the event that Father Biondi's conclusionary statements in his affidavit are treated as statements of facts, notwithstanding our prior arguments to the contrary, the record clearly shows that said alleged "facts" are genuinely disputed. Mo. Civ. Rule 74.04(C)(2).

As shown in point I, the two principal elements involved for a violation of Mo. Const. Art. IX, Sec. 8 is (1) a city's appropriation of a public fund, and, (2), to help support or sustain any university or other institution of learning controlled by any religious creed or sectarian denomination.

The first element, the appropriation of a public fund, is not in issue. It is admitted by the pleadings, Petition, Para. 14 and 17, (L.F. 24-5), Answer Para. 14 and 17 (L.F. 40-1), Counterclaim Paras. 54 and 38 and 39 (L.F. 50, 44-5) and the affidavits. Biondi Affidavit, Para. 6, (Vol. 2, Exh. C, p. 3); Estep Affidavit, Para. 7 (Vol. III, Exh. B, p. 3). This is as confirmed by Schoemehl's deposition testimony that, by the end of 2004, the sum of \$600,000 had already been collected from PILOTS and EATS, and was in the hands of the City Comptroller, (Vol. V, Schoemehl Depo. p. 110-111), part of which was designated for the district South of Lindell (SLU) (id. p. 119-120), and by SLU Chairman Julius Adorjan's deposition testimony that "we were relying upon the TIF for, I think,

approximately \$8 million of TIF money”(Vol. V, Adorjan Depo., p. 59, see also PP. 64 and 71-2; see also Arras Depo., pp 195, 197; Biondi Depo., p. 73-4, 78 (SLU Arena first in priority, p. 72, Estep Depo. Vol. 1, p. 198.).

Regarding the second element, that of helping support or sustain an institution of learning controlled by religious creed or denomination, neither SLU nor the City presented anything in their Motions for Summary Judgment denying that the TIF money would help to support and sustain SLU in the erection of its wholly owned arena. The issue presented, particularly by SLU’s affidavits, concerned the issue of control, *vel non*, by a religious creed or denomination.

Father Biondi’s affidavit involved what he termed “an independent lay Board of Trustees”, (notwithstanding that the By-Laws required a substantial percentage of Jesuits). As shown before, a lay board, even if true, does not disprove control by a religious sect or creed. *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 supra l.c. 613.

However, even if Biondi’s conclusionary statements about the “independent lay board” and about not being “controlled by ... any ... religious sect or creed” are taken as statements of fact, then these are more than adequately countered by appellants’ submissions of:

1. The requirements in the By-Laws that obligate the trustees to run the university, not independently, with a free rein, but “as a Catholic university, and as a Jesuit university, ... motivated by the moral, spiritual and religious inspiration and values of the Judaeo-Christian tradition ... guided by the spiritual and intellectual ideals of the Society of Jesus.” (Vol. III, Exh. C, Attachment 1, p. 1).

2. The admissions from Father Biondi, SLU’s President, that that university is, indeed, operated according to the By-Laws. (Vol. III, Exh.. C, p. 27).

3. Father Biondi’s statement that the \$8,000,000 from the TIF was necessary to construct an arena “as an attractive venue for students from across the United States to come to this campus to be educated in the Jesuit tradition.” (Vol. III, Exh.. C p. 77-78).

4. The By- Law requirement that the President shall be a member of the Society of Jesus, and that he shall have the general and active management, control and direction of the business operations, educational activities and other affairs of the University (Vol. III, Exh.. C, Attachment 1, p. 5).

5. Temple Parties' pleading by way of affirmative defense or avoidance of the Mission Statement of SLU in their Para. 42 (L.F. 45) that the mission of Saint Louis University is the pursuit of truth for the greater glory of God, dedicated to leadership in the continuing quest for understanding of God's creation, and for the discovery, dissemination and integration of the values, knowledge and skills required to transform society in the spirit of the Gospels; and as a Catholic, Jesuit university, the pursuit being motivated by the inspiration and values of the Judeo-Christian tradition and being guided by the spiritual and intellectual ideals of the Society of Jesus.

Said pleading of the Mission Statement of SLU is a pleading of fact. That this is SLU's Mission Statement was not controverted by any facts pleaded or shown of record by affidavit or otherwise by either of the moving parties. Under such circumstances, it is deemed true for the purposes of a summary judgment. *Rodgers v. Threlkeld*, 22 S.W.3d 706, 711-2 (Mo. App. W.D. 1999).

6. Temple Parties' pleading in their Para. 42 (L.F. 45) that the advancement of Catholic religious teachings and philosophy is an integral part of the University's mission and program. Similarly to paragraph 5 above, this, also, was not controverted by movants or by anything in the record, and, therefore, is deemed true herein.

7. Barbara Arras' deposition testimony, stating in part, in answer to the question of SLU being a religious institution: "I see fifty banners up and down the street that say 'In the Lord's service'. There's a big sign, a bill board that says the same thing." (Vol. V, Arras Depo. p. 134).

8. The motto of the Jesuits, "Ad Majorem Dei Gloriam", which is "For the Greater Glory of God". (Vol. V, Biondi Depo. p. 35).

9. Father Biondi's description of the general purpose of the Jesuits as follows:  
"Well, the general purpose of the Jesuits is basically to help anybody who would like to gain the salvation of their souls, by which we would look at it in modern days through education and other kinds of what we call apostolic works." ( Vol. V, Biondi Depo., 6-7).

10. Fa

Basically, as a Jesuit University, we say that like to live out our ideals in the Jesuit tradition, . . .

. . . our philosophy is to teach young men and women to be good citizens, to follow their Judeo-Christian conscience, to become leaders in their society after they graduate . . .

. . . so it's not only trying to give our students in a Jesuit tradition an education, but also to change their characters into what we call men and women for others .

..

(Exh. Vol. V., Biondi Depo., p. 12-13).

11. The following reading, purportedly from SLU's web site prefaced with "What makes an education Jesuit?" to which father Biondi stated that he had not seen it, but when asked if it was a fair description of one of the ways in which spirituality is integrated in the educational process at St. Louis University, answered "It could be interpreted that way."

. . .the same key characteristics of Jesuit higher education that the Jesuits offer for further reflection and discussion are, 1. Dedicated to human dignity from a Catholic, Jesuit faith perspective. For the founder of the Jesuits, Ignatius of Loyola, God can be found in all things, because all of reality is an arena of God's self revelation.

2. Reverence for and an ongoing reflection on human experience. This is key to The Spiritual Exercises and is premised in the belief that one can discover God's presence in one's life and the freedom to respond to that

presence through a series of prayer exercises and through personal conversion. ( Vol. V., Biondi Depo., p. 33-34).

12. The fact that, although there may be lay participation in the Jesuits, any change in the basic tenets of the Jesuits would come through the Jesuits themselves. (Vol. V, Biondi Depo., p. 36).

It is submitted that if the trial judge considered the summary judgment motions on the basis of the plain wording of the Missouri constitutional provisions, instead of on rules applicable to the federal establishment clause, the decision should and would have been a summary judgment for Appellants. At the very least, there was a genuine issue of disputed fact, making summary judgment for Respondents inappropriate.

## V

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT REGARDING THE FEDERAL ESTABLISHMENT CLAUSE, BECAUSE THE ISSUE OF EXCESSIVE ENTANGLEMENT REMAINED UNCHALLENGED, IN THAT TEMPLE PARTIES DULY PLEADED FACTS CONSTITUTING EXCESSIVE ENTANGLEMENT BETWEEN TAXING POWERS AND A RELIGIOUSLY CONTROLLED INSTITUTION, AND SAID ISSUE WENT UNCHALLENGED BY MOVANTS BY AFFIDAVITS OR OTHER PROPER EVIDENCE.**

Appellants' Point V, also is in addition to and in the alternative to Point I, and involves the federal establishment clause.

The standard of review is as in Points I and II.

The third prong of the *Lemon v. Kurzman*, 403 U.S. 673, 91 S. Ct. 2105, 29 L.Ed.2d 745(1971) test as adopted by *Americans United v. Rogers*, supra, 538 S.W.2d 711, 716 is that the state aid, to pass constitutional muster, must "have no tendency to entangle the state excessively in church affairs".

The Court of Appeals majority did not address this point dealing with the US Establishment clause on the grounds that the Missouri clause, which it did address was more restrictive. We suggest that this was error.

The phrase used in the said test is “no tendency to entangle”. Under this test, even a slight tendency could be sufficient to violate the clause.

Temple Parties pleaded facts to the effect of excessive government entanglement with a religious institution. (Para. 43 at L.F. 46 as adopted at Para. 58 at L.F. 52):

43. Thus, the TIF ordinances were enacted in such a way as to provide financial aid to a religious institution from city and state taxpayers’ money. The ordinances were enacted and implemented in such a way as to permit participation and control of the taxing powers by said religious institution, in particular with reference to the University Sub-Account as defined in the ordinance, leading to excessive government entanglement with a religious institution.

Neither Father Biondi’s affidavit nor any other proper evidence submitted by movants controverted the above statement. It stands admitted for the purposes of this Summary Judgment. *Rodgers v. Threlkeld*, 22 S.W.3d 706, 711-2 (Mo. App W.D. 1999).

SLU erroneously relies on *Menorah Medical Center v. Health & Ed. Fac. A.*, 584 S.W.2d 73 (Mo. banc 1979). case as somehow demonstrating that Tax Increment Financing made to SLU, a religious institution, does not create “excessive entanglement” between church and state. However, there are fundamental differences between the situation in *Menorah* and that of the Grand Center TIF. SLU clearly fails to meet the standard for entanglement set by the three judge plurality in *Menorah*. who addressed the issue, as follows:

[W]e note that entanglement itself is not prohibited. Only excessive entanglement is forbidden. Four overall observations lead us to conclude that

no excessive entanglement exists in the present case: (1) the state is not directly involved in expending or in supervising expenditure of funds, (2) funds are being used to promote a public purpose, not a sectarian one, (3) the funds involved are being used in a neutral fashion, for the construction of physical facilities, and (4) facilities for the higher education level, as opposed to elementary or secondary level, are in issue. 584 S.W.2d at 87.

The differences are mainly in connection with (1) and (2) above, with principal emphasis on (1)

In this connection the *Menorah* plurality states at l.c. 87

We reiterate our earlier conclusion that the state is not the financing mechanism. Financing is through contractual arrangements between the independent authority and a given educational or health institution and bondholders. The Authority does not become a subdivision of the state simply because it deals with tax exempt bonds and there is no impairment of state credit involved. Thus, the state is not involved in establishing religion.

In *Menorah*, a bond issuing Authority, which was not a subdivision of the state with any power of taxation, had permitted tax exempt bonds to be issued that in no way relied on public funds or creditworthiness. The TIF notes financing the SLU Arena are issued by the City of St. Louis, and rely directly on its power of taxation, and the public funds collected within the TIF district, to pay off the notes, and the City assumes liability in an event of default. This is the situation prohibited by *Menorah*, where the Court went to great lengths to emphasize that the bonds were not issued by a political subdivision and that all of the revenues to pay off the bonds were generated by rents from the *Menorah* project, which in no way relied on taxes or public funds for revenues.

As stated by the *Menorah* court at l.c. 78

... the Act establishing the Authority makes it clear that the bonds issued by that Authority are payable solely from the revenues and receipts generated

by the sale or lease of the facilities involved, and not from taxation, and thus the bonds do not constitute a debt of the state or any political subdivision thereof. §§ 360.060, 360.080.

In contrast, consider the basic facts governing the Grand Center TIF as expressed in the original “Note Ordinance”, City of St. Louis Ordinance 65858:

Article I, Definitions:

“City” means the City of St. Louis, Missouri, a body corporate and political subdivision duly authorized and existing under the its charter and the Constitution and laws of the State of Missouri. (Vol. I, C, p. 4).

Article VI:

Section 601 City to Issue Notes. The City covenants that it is duly authorized under the laws of the State to issue the Notes and to designate the Fiscal Agent; ... and that the Notes ... are and will be valid and enforceable limited obligations of the City according to the import thereof. (Vol. I, C, p. 23).

Article X:

Section 1004 Execution of Documents; Further Authority. The City is hereby authorized to enter into and the Mayor, the Comptroller and the Treasurer of the City are hereby authorized and directed to execute and deliver, for and on behalf of and as the act and deed of the City, the TIF Notes and such other documents, certificates and instruments as may be necessary or desirable to carry out and comply with the intent of this Ordinance. (Vol. I, C, p.34).

Article I, Definitions:

“TIF Notes” means the not to exceed \$80,000,000 Tax Increment Revenue Notes (Grand Center Redevelopment Project), Series A, B, C and D, issued by the City pursuant to and subject to this Ordinance in substantially the form set forth in Exhibit B, attached hereto and incorporated herein by reference. (Vol. I, C, p.9).

Article II, Section 202 Nature of Obligations.

(a) The TIF Notes and the interest thereon shall be special, limited obligations of the City payable solely from the Pledged Revenues and other moneys pledged thereto and held by the Fiscal Agent as provided herein. (Vol. I, C, p. 10).

Unlike in *Menorah*, the Notes for up to \$80 million of Tax Increment Financing are to be directly issued by the City of St. Louis, a political subdivision, which acts as the financing mechanism in every significant aspect.

Also, unlike in *Menorah*, the liabilities incurred by the TIF Notes to be issued by the City are to be covered by revenues exclusively from public funds, derived from real estate (PILOTS), sales, utilities and other taxes (EATS), and are absolutely dependent on the City's power of taxation.

Ordinance 65858, Section I, Definitions:

“TIF Revenues” means: (1) Payments in Lieu of Taxes attributable to the increase in the current equalized assessed valuation of each taxable lot, block, tract, or parcel of real property located within the Redevelopment Area over and above the initial equalized assessed value (as that term is used and described in Section 99.845.1 of the TIF Act) of each such unit of property, as paid to the City Treasurer by the City Collector of Revenue during the term of the Redevelopment Plan and the Redevelopment Project, and (2) fifty percent (50%) of the total additional revenues from taxes which are imposed by the City or other taxing districts (as that term is defined in Section 99.805(16) of the TIF Act) and which are generated by economic activities within the Redevelopment Area over the amount of such taxes generated by economic activities within the Redevelopment Area in the calendar year ending December 31, 2001... (Vol. I, C, p. 9).

It is particularly significant that the extra taxes that the various merchants in the area will be paying and which are being applied for the benefit of SLU's arena, could have little or no connection with any increased receipts due to the arena, but may well be due to increased economic activities because of the merchant's own efforts of investment, expansion, advertising, etc. There would be no *quit pro quo*.

Article VI, Section 603 Collection of Payments in Lieu of Taxes and Economic Activity Taxes provides:

The City shall ... (a) take all lawful action within its control to cause the City Assessor to assess the real property and improvements within the Redevelopment Area at the times and in the manner required by the Act, and (b) take such action as may be required to cause the City Collector and all other persons to pay all Economic Activity Taxes which are due to the City under the Act. (Vol. I, C. p. 23).

SLU, as a tax-exempt religious university, does not pay the real estate taxes and other taxes that would normally contribute to the PILOTS and EATS to pay off the \$8 million of A Notes it has been allocated. The burden of payment of the SLU Arena TIF therefore, as shown before, falls upon public funds that the City of St. Louis collects using its taxation powers from property owners, residents and business operators throughout the Grand Center TIF district. Clearly, contrary to the standard set in *Menorah*, the TIF Notes do create a "liability" that means "a contractual indebtedness, present or future, absolute or contingent, which will or may be liquidated by general taxation."

Moreover, the City's allocation of \$8 million in A Series Notes to the SLU Arena takes a priority position over all other indebtedness in the B, C and D Series Notes.

Ordinance 65858: Article II, Section 203 Description of TIF Notes, provides

(g) Priority... The Series A Notes shall be superior to the Series B Notes, the Series C Notes and the Series D Notes and shall be fully redeemed prior to any

payment of the Series B Notes, the Series C Notes or the Series D Notes. (Vol. I, C, p.12).

In practical reality, the City's allocation of A Notes has now authorized SLU to claim virtually all funds available in the Grand Center TIF for the development of its wholly owned Arena. Unlike other TIFs, which repay the debt from the tax and other revenues generated by the project, the SLU Arena depends on public funds from the property owners, residents and business operators within the approximately one square-mile Grand Center TIF district. (St. Louis City Ordinance 65858, EXHIBIT A, Legal Description of Redevelopment Area.) (Vol. I, C, pp. 36-58).

Thus, the ordinances, themselves, clearly demonstrate the extent of the entanglement of the City of St. Louis using its powers of taxation to directly benefit SLU, a Jesuit, Catholic university.

The entanglement is even further emphasized by the high degree of participation by the City, Grand Center and SLU in the figuring of the added tax. As stated by Respondent Vincent Schoemehl, Grand Center's President, the ultimate responsibility for the figuring of the PILOTS and EATS is with the City's Comptroller Office (Vol. 5, Schoemehl Depo., p. 127-8), but it must be with the reporting help and cooperation of the developers and business owners in the district (id p. 131). Nor is the reporting and cooperation limited to a mere reporting of receipts as with an income tax or sales tax return. It includes the necessity of cooperation, agreement and dispute resolution as to property evaluations and the amount of those taxes that are "generated by economic activities within the Redevelopment Area", not otherwise defined.

Traditionally, the designation of taxable entities and responsibilities to assess and collect those taxes is strictly a governmental function. This is not so with the TIF ordinances in that the religious institution, itself, becomes involved. It is to the distinct interest of St. Louis University, an admitted Catholic, Jesuit University, to add to the

taxed entities and to lobby the City of St. Louis' assessor for higher property taxes, as this will be the source of TIF income for the new arena.

Julius Adorjan, Chairman of the SLU Board of Trustees (and former President of Grand Center, Inc.), gave deposition testimony that “under the TIF which is now in place, I know that a lot of the work was done by the staff to make sure that people were on the tax rolls because the incremental taxes, I think, get collected into this TIF, . . .” (Vol. V, Adorjan Depo. p. 38). It is submitted that this is clearly excessive entanglement.

Money spent by SLU to build its Arena will create a debt to the purchasers of the A Notes that finance construction of the SLU Arena. The Owners of the Notes will then likely lobby the City of St. Louis through Grand Center, Inc. to provide public funds to meet debt service coverage requirements by raising taxes on private properties and businesses that are unrelated to the SLU Arena.

Thus, far from being excluded from the financing mechanism as required in *Menorah*, the City of St. Louis, a political subdivision of the state of Missouri, is thoroughly entangled in this district TIF financing by levying taxes, collecting taxes, paying the debts SLU incurs for its property development, and having liabilities in the event of default.

A final entanglement inherent in the Grand Center TIF concerns SLU's capacity to indebt its neighbors while benefitting itself with their taxes. The more TIF money that SLU spends to improve its tax exempt properties, the more the TIF district neighborhood becomes indebted, and the higher the taxes need to be to service the debt. As SLU takes TIF funds, the City will need to raise Assessed Values of properties in the district increase tax revenues to pay the TIF Notes. Higher property taxes tend to “squeeze out” marginal property owners. SLU is in the position of being able to take advantage of bargain sales of taxpayers' properties, and by said purchases , simultaneously reducing the district's tax base by expanding its tax-exempt ownership, further increasing upward pressure on taxes.

Whatever its original purpose, TIF legislation in Missouri was never intended to create tax districts to permit religious institutions to be enriched at the expense of taxpayers.

With reference to the Summary Judgment decision of the Circuit Court and the Majority Opinion in the Court of Appeals, the Temple Parties have again been denied a hearing of their case improperly. The Summary Judgment was made by assuming that all inferences in the Menorah case should be interpreted in favor of Saint Louis University without careful consideration of the facts of the case. There are many facts in dispute related to the Menorah case, and the Temple Parties have been denied an opportunity to prove their case in a trial.

It is submitted that excessive entanglement appears from the face of the ordinances and that Temple Parties are entitled to judgment as to unconstitutionality under U.S. Const. Amendment I. In the alternative, entanglement is a real factual issue that has not been resolved by affidavits or otherwise and the trial court erred in granting summary judgment. Temple Parties are entitled to their day in court on this issue.

## **VI.**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT REGARDING THE FEDERAL ESTABLISHMENT CLAUSE, BECAUSE THE TRIAL COURT IGNORED AND FAILED TO APPLY THE REFINEMENT OF THE *LEMON* DOCTRINE ANNOUNCED IN *HUNT V. MCNAIR* , IN THAT, UNDER SAID REFINEMENT, A CONSTITUTIONAL VIOLATION MAY NEVERTHELESS BE PRESENT WHEN A SUBSTANTIAL PORTION OF AN INSTITUTION'S FUNCTIONS ARE SUBSUMED IN ITS RELIGIOUS MISSION, AND SUCH IS THE SITUATION IN THE CASE-AT-BAR**

Appellants' Point VI, also is in addition to and in the alternative to Point I, and involves the federal establishment clause.

The standard of review is as in Points I and II.

The U.S. Supreme Court case of *Hunt v. McNair* (1973), 413 U.S. 734 at 743, 93 S. Ct. [2868], at 2874, 37 L.Ed.2d 923, declared a new refinement in the Lemon three prong test, which our Missouri Supreme Court recognized and adopted for those cases involving the federal Establishment Clause.

The Missouri case is *Americans United v. Rogers*, supra, 538 S.W.2d 711 which stated at l.c. 716, after first referring to the Lemon three prong test, "... as conditioned by the ultimate refinement thereof found in *Hunt v. McNair* (1973), 413 U.S. 734 at 743, 93 S. Ct. [2868], at 2874, 37 L.Ed.2d 923, that a constitutional violation may nevertheless be present '... when it [aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . .'".

Here again, the Court of Appeals majority did not address the point by reason of its finding in connection with the Missouri Constitution. Again, we suggest that this was error. An institution might well have a substantial portion of its functions subsumed in a religious mission even though it was not under the control of a creed or denomination.

Temple Parties pleaded facts showing that a substantial portion of SLU's functions are subsumed in its religious mission. As stated in their Para. 64 (L.F. 53) and Para. 42 (L.F. 45):

64. A substantial portion of Saint Louis University's functions are subsumed in its religious mission, by reason of the matters stated heretofore in paragraph 41 as well as its mission of educating men and women for others in the Catholic, Jesuit tradition, its continuous strivings to build upon its Catholic, Jesuit identity, its many religious retreats and conferences, its collecting and spending for Catholic charitable projects, its Catholic courses and studies and its Catholic conferences and large masses.

42. . . . The SLU Mission Statement states: "The mission of Saint Louis University is the pursuit of truth for the greater glory of God. 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 being guided by the spiritual and intellectual ideals of the Society of Jesus." The advancement of Catholic religious teachings and philosophy is an integral part of Saint Louis University's mission and program.

It is submitted that SLU's Mission Statement, itself, shows that a substantial portion of its functions are subsumed in its religious mission. Here, again, there was nothing in Father Biondi's affidavit or other proper evidence that contradicted the above statements of fact. Therefore, they are deemed true for the purposes of the Summary Judgment.

*Rodgers v. Threlkeld*, 22 S.W.3d 706, 711-2 (Mo. App W.D. 1999).

Since it is SLU's own Mission Statement that shows that its functions are subsumed in its religious mission, and since its authenticity is deemed admitted under Mo Civ. Rule 55.23, it is submitted that Temple Parties are entitled to judgment as to unconstitutionality under U.S. Const. Amendment I. In the alternative, this, too, at the very least, is a valid issue for trial.

## **CONCLUSION**

For the above reasons it is prayed and requested that the trial court's judgment of Summary Judgment for Saint Louis University and The City of St. Louis, be reversed, and that judgment be entered for the Temple Parties that the City's ordinances are unconstitutional under the Missouri and United States Constitutions, or, in the alternative that the case be remanded to the trial court for trial on the issues raised in the points above and for such other and further relief as may be proper.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b) and (c)

The undersigned certifies that the foregoing brief is not presented for any improper purpose and is warranted by existing law or a non-frivolous argument for the extension of existing law and the factual contentions have evidentiary support; that said Brief complies with the limitations contained in Rule 84.06 (b) and (c) and that the number of words in the Brief are 16821. The undersigned relied on the work count program of his word processing system to arrive at that number. The undersigned further certifies that the labeled disc, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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I certify that I have served one copy of this brief in form specified by Rule 84.06(a) and one copy of the disc required by rule 84.06(g) on Respondents by mailing same this 27th day of November, 2006 to Winthrop Reed, III, 500 N. Broadway, Ste. 2000, St. Louis, MO 63102 Attorney for St. Louis University, to Mark Lawson, Assistant City Counselor, City Hall, Room 314, St. Louis, Missouri, 63103 to Alana Barragan-Scott. Assistant Attorney General, Box 899, Jefferson City, MO 65102, and to Anthony E. Rothert, Attorney for ACLU of Eastern Missouri 4557 Laclede Ave., St. Louis, Missouri 63108

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