

TABLE OF CONTENTS

	Page
Table of Authorities	3
Argument	5
A. Respondents’ Avoidance Arguments	5
1. Re Attempt to Downgrade Mo. Const. Clauses	5
2. Church Control Point.....	6
3. Failure to Ask Continuance Point	6
4(a) Argument re: Board in Response to Majority’s Holding.....	8
4.(b) By-law Submission Discredited as not made to Trial Court ?	9
5. Constitutional Challenge Solely to Facial Invalidity	10
B. Merits, State	12
1. <i>Americans United v. Rogers</i>	12
2. Independence of Board Issue	15
3. Control by Religious Creed Issue	16
4. <i>Menorah</i>	21
5. Freedom of Speech Issue	22
6. TIF Funding for Secular Purposes Issue	24
7. Payment from Public Fund Issue	25
C Merits, Federal	26
1. Entanglement Issue	26
2 Subsumed Issue	30
D. Reply <i>Amicus</i>	31
Conclusion	32
Compliance Certification	33
Service Certificate.....	33.

TABLE OF AUTHORITIES

	Page
<i>Americans United v. Rogers</i> , 538 S.W 2d 711	12, 13, 14, 15, 20, 21
<i>Ashwander v. TVA</i> , 297 U.S. 288	23.
<i>Artman v. State Bd.</i> , 918 S.W.2d 247	11
<i>Barnes v. Bailey</i> , 706 S.W.2d 25	5
<i>Beartty v. Tax Commission</i> , 912 S.W.2d 492	8
<i>Champion v.. Hunt Transport</i> , 6 S.W.3d 924	8

<i>Christiansen v. Fulton Hospital</i> , 536 S.W.2d 159	23
<i>Davis v. Long</i> , 521 S.W.2d 7	19
<i>Good New Club v. Milford</i> 533 U.S. 98	26
<i>Harfst v. Hoegen</i> , 163 S.W.2d 609	31
<i>ITT v. MidAmerica</i> , 854 S.W.2d 371	8, 9, 20, 27, 30
<i>Lemon v. Kurtzman</i> , 403 U.S. 602	4, 21, 26, 29
<i>Luetkemeyer v. Kaufmann</i> , 364 F. Supp.. 376	23
<i>Mallory v. Barbera</i> 544 S.W.2d 556,	26
<i>Menorah Medical v. Ashcroft</i> , 584 S.W.2d 73	20, 28
<i>Millard Farms, v. Sprock</i> , 829 S.W.2d 1	17
<i>Mitchell v. Helms</i> , 530 U.S. 793,	26, 27, 29
<i>Mueller v. Allen</i> 463 U.S. 388, 397	30
<i>Murphy v. Carron</i> , 536 S.W.2d 30	9
<i>Pippin v. Pippin</i> , 154 S.W.3d 376,	22
<i>Rodgers v. Threlkeld</i> , 22 S.W.3d 706,	27, 28, 30
<i>Roemer v. Bd. Public Works</i> , 426 U.S. 736	31
<i>State v. Atterbury</i> , 300 S.W.2d 806	24
<i>State v. Bowman</i> , 741 S.W.2d 10	5
<i>Tilton v. Richardson</i> , 403 U.S. 672	25
<i>Tom v. Sutton</i> , 533 F.2d 1101,	5
<i>Ullmann v. United States</i> , 350 U.S. 422,	5
<i>Widmar v Vincent</i> , 454 U.S. 263,	22, 23, 31
<i>Zobrest v. Catalina</i> . 509 U.S. 1	23
US. Const. Amend I	22, 23

Mo. Const. Art I, Sec. 7	5,
23	
Art. IX, Sec. 8	5, 14, 23, 24,
25	
Mo.Civ. Rule 84.04(d)(4).....	31
. Rule 84..04(f)	31
Rule 84.04(i)	17, 27, 29,
30	
Ordinance 65703,	25
Ordinance 65858	28

ARGUMENT

A. RESPONDENTS’ AVOIDANCE ARGUMENTS

Appellants submit that the validity of Appellants’ principal Points is tacitly conceded by the Respondents’ following avoidance arguments and straw man issues

1.. **SLU’s Attempt to Downgrade Mo Const. Clauses as the Product of “Religious Bigotry”, has no Support in Constitutional Construction Rules.**

A thrust of SLU’s constitutional argument is the implication that Missouri’s establishment clause provisions (so-called Blaine Amendments) do not deserve serious consideration because of being discredited by certain Justices and writers as being “anti-

Catholic” (Brief p. 30) and the product of “Religious Bigotry” (Brief, p. 31), the implication being that there are good and bad provisions of our Missouri Constitution and only the good need be strictly followed.

The mere suggestion carries its own refutation.

It has long been the rule of construction that every constitutional provision is entitled to equal dignity. *State v. Bowman*, 741 S.W.2d 10, 13 (Mo.banc 1987) holds, “We have the duty of giving our state constitutional provisions vitality, in accordance with the intent of the voters and their plain language”. *Barnes v. Bailey*, 706 S.W.2d 25, 28 (Mo.banc 1986), states, “A construction which renders meaningless any of its provisions should not be adopted by the court.”

Federal construction is similar, being stated in *Tom v. Sutton*, 533 F.2d 1101, 1106 (9th Cir. 1976), “all constitutional provisions are of equal dignity”, and in *Ullmann v. United States*, 350 U.S. 422, 428,

As no constitutional guarantee enjoys preference, so none should

suffer s

2. SLU’s Contention that it is not Under the Control of the Catholic Church is a Straw Man Argument. Appellants’ Principal Point is that SLU is under the Control of a Religious Creed rather than a Church).

SLU argues at page 38 of its Brief:

Nowhere do the University bylaws state that it is or even should be hospital to Tenet Health Care in 1998. The sale was made against the strong and well publicized objection of the Catholic Archbishop of St. Louis.

control

Temple Parties’ principal point is that SLU is under the control of a religious creed rather than a church. This distinction was recognized by Judge Mooney who observed, “[a] school, which is not controlled or directed by a denomination, might still

be controlled by its creed.” The Catholic Archbishop’s lack of influence over SLU’s hospital sale fails to establish that SLU is not under the control of a religious creed.

3. SLU’s Claim that Temple Parties Failed to Ask for a Continuance to Develop the Record is still Another Straw Man Argument that Attempts to Shift the Summary Judgment Burden to Temple Parties.

Temple Parties’ principal point in this appeal is that Respondents failed to sustain their summary judgment burden of submitting facts that SLU was not under the control of a religious creed. Finding itself unable successfully to refute this point, SLU at Brief, p. 37, sets up a straw man argument that it could refute, stating, as if Appellants had the summary judgment burden, “A party cannot complain on appeal that a trial court erred in failing to order a continuance of a summary judgment hearing to permit further development of the record when the party never asked the trial court for such a continuance.” SLU makes a similar argument at Brief, p. 65, claiming that this failure, plus the Motion for Judgment on the Pleadings, meant that Temple Parties were putting “all of their eggs in a single basket”, and that any deficiency in the summary judgment record was at their risk.

We respectfully submit that it is SLU that has laid the egg with this argument Failure to grant a continuance has nowhere been raised as an issue by Temple Parties. No such continuance was ever requested as there was no need to. Appellants have consistently, throughout the trial court, Court of Appeals and this Court’s proceedings, urged the deficiencies of Respondents’ summary judgment record and, alternately, the existence of disputed facts by reason of the counter submissions.

The mere fact that Temple Parties filed a Motion for Judgment on the Pleadings does not foreclose them from the normal procedures and burden of proof of a separate summary judgment motion. SLU has offered no case suggesting same. Nor has SLU stated that authority supporting its position is otherwise unavailable. For this reason,

also, SLU's contention should not be considered or should be otherwise denied. *Beatty v. State Tax Commission*, 912 S.W.2d 492 (Mo.banc 1995); *Champion v. J.B. Hunt Transport .*, 6 S.W.3d 924, 931(Mo.App.1999)

4(a.) **Temple Parties' Point that the Statistical Composition of SLU's Board Fails to Prove or Disprove Religious Control or Orientation, is Faulted by SLU as being Raised for the First Time in this Court. However, the Point was in Direct Response to One of the Court of Appeals' Majority's Principal Arguments in Support of their Opinion.**

It is and has been Temple Parties' Position that Respondents have failed in their burden to produce facts sufficient for summary judgment as required by *ITT Commercial Financial v. Mid America Marine*, 854 S.W.2d 371, 376. (SLU's argument tries to shift this burden to Temple Parties.) It was the Court of Appeals majority that cited the make-up of the Board as the major factor in their determination of absence of religious control, (Opinion, p. 6 (25A)).

In view of this argument, it would be strange indeed if Temple Parties could not respond by showing the illogic of the majority's argument in connection with summary judgment, that proof that nine board members are Jesuit, is not proof that the others are Catholic or non-Catholic or a lay board or not a lay board. There was no other evidence whatsoever establishing the independence of the Board.

The majority's rationale entitles Temple Parties to make refutation concerning the make-up of the Board for still another reason set out in *ITT supra*, which states at 382 that "a genuine issue exists where the record contains competent materials that evidence two plausible but contradictory, accounts of the essential facts."

Under *ITT* and *Murphy v. Carron*, 536 S.W.2d 30, (Mo. banc 1976) Temple Parties had the right to point out that the statistical composition of this particular SLU Board was no more consistent with independence of the Board than it was of a Board

controlled by a religious creed. Both were plausible but contradictory accounts of the essential facts.

SLU argues at brief, page 37, that Temple Parties' position is contrary to their trial court position that "the number of board of Trustees as Catholic or Jesuit is irrelevant . . .". It is not inconsistent. If, notwithstanding Appellants' primary position regarding the evidence of control under a creed, the Court of Appeals' majority attributes importance to the claimed "independence" of the Board, Temple Parties should be free to point out that, under the majority's own theory, the essential fact is not established by said evidence.. There is no inconsistency in this.

4 (b) Temple Parties' Point that SLU's By-Laws, and Other Submissions, Constitute Strong Evidence of SLU being under the Control of a Religious Creed, is Attempted to be Discredited by SLU as being Raised for the First Time on Appeal. SLU is Incorrect.

SLU claims (Brief, 47) that Temple Parties' point that SLU's board is committed under its by-laws to run the university in the Catholic-Jesuit tradition, is a change from its trial court position and urged for the first time on appeal. SLU could not be more wrong.

In Temple Parties' summary judgment response (L.F. 198-199), they set out at length the fact that they are relying on SLU's own by-laws as showing that the university is under the control of a religious creed.

SLU makes a similar assertion (Brief p. 61) that a principal contention of Temple Parties, -i.e.- the existence of disputed issues of material fact prohibiting summary judgment, was not made in the trial court. This, also is incorrect. In their summary judgment responses (L.F. 199), Temple Parties offered the previously mentioned by-law provisions as a counter to SLU's contention of operation under the control of an independent Board. At L.F. 203 Appellants state "the selected deposition testimony of Father Biondi and the SLU by-laws contradict his affidavit by establishing SLU is a

Jesuit and Catholic controlled university. At L.F. 205-6 they state, “In the case at bar Exhibit A (Answer of Masonic Temple and Property Owners) lists several Affirmative Defenses which SLU has failed to negate including violations of the Establishment Clauses of the Missouri and Federal Constitutions. . . .” Similar references are made at L.F.. 208, 209 and 210. In our First Brief, pages 52-55 we make specific references to all the exhibits and testimony that were before the trial court in the summary judgment determination in connection with twelve statements of undisputed facts, which SLU admits are undisputed. (SLU Brief, p. 62).

5. City Claims that Temple Parties’ Challenge is Solely to the Facial Invalidity of the Ordinances and not “As applied” and that, therefore, any Circumstance under which the Financing Project could be Terminated would Defeat Facial Invalidity in that it would be “a Set of Circumstances . . . under which the Act would be valid” City is Incorrect in its Factual Premise and in the Application thereof.

City argues for the first time on appeal that the constitutional issue should not be reached because of the ability of the City Comptroller to cancel the Arena project if it does not proceed as planned.(Brief, p. 17-18) City contends that Temple Parties are not entitled to argue unconstitutionality of the act “as implemented” on the ground that (1), Temple Parties’ pleadings were limited to the proposition that the “TIF ordinances were facially invalid” (Brief, p.17), and (2), City’s Motion for Summary Judgment was addressed to Temple Parties’ Motion for Judgment on the Pleadings, which was based solely on “a theory of facial invalidity.”

City is incorrect in each of its above factual premises. (1) Temple Parties’ pleadings of establishment clause unconstitutionality were not limited to facial invalidity, but included allegations that they were invalid as applied or implemented (Par. 39, L.F. 44; Par. 99, L.F. 63; par. 112, L.F. 69).. (2) City’s summary judgment challenge was

not directed to the Motion for Judgment on the Pleadings but was “addressed to all counts of the ‘Counterclaim’ of the Masonic Temple Defendants” (Par. 6, L.F. 85), which contained the above mentioned pleadings of invalidity as implemented.

City’s legal reasoning is also flawed, even if the issue were facial invalidity. It cites *Artman v. State Bd.*, 918 S.W.2d 247, 251 (Mo. banc 1996) that, in connection with any contention of facial invalidity, showing must be made “that no set of circumstances exists under which the Act would be valid.” City argues that since the city comptroller can cancel the funding if the project does not satisfactorily proceed, this is such a circumstance.

That the project might be canceled as a condition subsequent has nothing to do with the Ordinance’s validity based on impermissible state aid to a religiously controlled institution. No case is cited in support thereof. No party has made the slightest intimation that the TIF project will not proceed if permitted to do so by Missouri’s courts. By Ordinance, the money is already segregated to a discrete fund called the University Sub-Account (City’s Brief, p. 10; Schoemehl Depo.) and therefore, unavailable for the general public. SLU has made it clear in its pleadings (Par. 14, L.F. 24-25) and statements of Father Biondi (Vol. II, Exh. C, p. 3, Par. 6; Vol. III, Exh C, p. 77-8), that the \$8,000,000 TIF money is wanted. Countless man hours on the part of City and SLU have been expended in connection with the project.

It is suggested that the above matters in avoidance are without merit and that the constitutional issues should be decided on the merits.

B. THE MERITS, STATE ISSUES:

1. *Americans United v. Rogers* does not Support Respondents’ Reliance Thereon under the Facts of the Case-at-Bar

SLU argues at Brief, p. 38-9 and City at Brief, p. 26-7, 31-33 that *Americans United v. Rogers*, 538 S.W 2d 711, (Mo. 1943) is applicable in that it establishes that “an independent corporate board is a critical factor . . .” (SLU Brief, p. 38). This reasoning is flawed in that, what may be a critical factor in one case may not be in another having a different factual situation, such as the by-law provisions in the case-at-bar..

Organizations are controlled by their Boards. The Board, in its turn, is under the control of the organization’s by-laws. If the by-laws are not brought into focus, the independence *vel non* of the Board may well be a “critical factor” in the determination of whether the control of the school is under a religious creed. If the by-laws are brought into focus, the situation is entirely different. As stated by Judge Mooney concerning the by-law provision that SLU shall be publicly identified as a Catholic and Jesuit University and shall be governed in accordance with that identity:

These are, after all the dictates of the university’s governing documents and not mere hollow words. . . . it is a matter of the University’s identity

Boards come and go. An organization’s governing documents set the standards for its identity and operation.

The fact that an “independent board” may be of either greater or lesser importance, depending on the facts, is clearly shown by Judge Mooney’s statement that “a board might be fiercely independent, but still operate a sectarian institution” (Appendix 31A).

SLU’s and City’s reliance on *Americans United* is misplaced for still another cogent reason. The “independence” of the board in *Americans United* was a given, since the school had to be prequalified as having an independent board by the accrediting committee.. With the TIF, there is no such prequalification, nor is there any evidence sufficient for summary judgment establishing said “independence” as a fact. .

City at Brief, p. 33 , states, “*Americans United* did invoke the second element of the *Lemon* test in analyzing the state constitutional provisions”, and at Brief, p. 35 states,

“Temple Parties provide no explanation for why *Americans United* discusses the secular purpose of the proposed moneys in the context of the Missouri constitutional provisions.” The simple explanation is that the issue of secular v. sectarian purposes can be a very valid state consideration depending on which provision of Article IX, Sec. 8 is involved. The second prong of *Lemon* deals directly with this secular v. sectarian issue.

The Court in *Americans United* demonstrated that it was perfectly aware that Article IX, Sec. 8 contained two different and separate prohibitions, one concerning purposes, -i.e.- secular v. sectarian, and one concerning identity of the proposed recipient, -i.e.- religious or not. These two separate provisions are acknowledged in SLU’s Brief at p. 33-4.

City quotes *Americans United* at 717-8, stating:

2. Is the primary effect of the statutory program other than the
await consideration of our state constitution, which not
only proscribes “advancement of religion” generally but other related

Then, at 721 the Court states:

In answer to the second part of the federal test (heretofore reserved), we
Thus, the Court recognizes that it is dealing only with the “purposes” part of the clause and that this is separate from the “control by any religious creed” clause which is one of the other “related activities” that is the particular wording of the Missouri constitution. The Court addresses the Missouri “control” clause at l.c. 721 by stating, “The constitutional restriction is only that the institution not be ‘... controlled by any religious creed, church or sectarian denomination ...’” The Court then goes on to discuss this provision under its own interpretation without the slightest hint of employing federal rules, which, in fact, would be hard to do since the Missouri phrase is so different.

Actually, nothing in *Americans United* or any other Missouri case, indicates that a secular purpose removes the SLU arena money from the “controlled by a religious creed” prohibition.

2. SLU's Contention that Temple Parties Offered no Contradictory Evidence regarding the "Independence of the Board" Issue is Completely Disproved by the Record.

Regarding SLU's reliance on its "independence of the Board" issue, it makes the insupportable claim (Brief, p. 38), that "[a]ppellants offered no contradictory evidence in responding to summary judgment."

Temple Parties' primary position is that SLU did not submit any facts consistent with independence of the board that would require a summary judgment response. But, assuming it did, Temple Parties have offered the evidence of SLU's by-laws, which, themselves, without more, demonstrate that SLU is under the control of a religious creed. If the by-laws are not conclusive, then, at the very least, they, plus the eleven other items of evidence referred to at pages 52-55 of our first substitute brief, raise a factual question regarding the independence of the board. The claim that Temple Parties have "offered no contradictory evidence" is blatantly incorrect.

3. SLU's Attempt at Refutation of the "Control by a Religious Creed" Point Fails in the Summary Judgment Posture of the Case

If Respondents are contending as a fact that the "spiritual and religious inspiration and values of the Judaeo-Christian tradition" and that "Spiritual and intellectual ideals of the Society of Jesus" (L.F. 199; Vol. III Exh. C, Attachment 1, p.1.) are not a religious creed, the rules of summary judgment require that these facts be set out, with the movant having the burden. *ITT* supra at 380. In its submissions for summary judgment, SLU submitted no facts on the "creed" issue. The emphasis of SLU's submissions was on the "independence of the board" issue, with the facts submitted being concentrated on the make-up of the board. (L.F. 117-8; Exh C).

It is respectfully submitted that SLU's deficiency in producing evidence as to absence of religious control is compounded by its incorrect and unsupported statement at its Brief, page 47, referring to the "undisputed facts showing lack of religious indoctrination at Saint Louis University." (with no reference to the record.) There was no such evidence. ¹

Recognizing the deficiencies of its submissions regarding the control issue, and Judge Mooney's characterization of the "remarkably thin summary judgment record focused on its presently law governing board", SLU attempts to supply the omissions with unsupported statements of supposed fact (Brief, p. 41):

It (SLU) does not discriminate in either hiring or admissions based on Said statements of "fact" are in non-compliance with Rule 84.04(i), requiring that statements of fact and argument in a brief shall have specific page references to the record. None of SLU's said statements of supposed fact has any such page reference. Nor did these "facts" appear anywhere in SLU's formal "Statement of Facts".. Such unsupported statements are not considered by the appellate court on appeal. *Millard Farms v. Sprock*, 829 S.W.2d 1, 4 (Mo.App.E.D. 1991)

Even though Temple Parties had no obligation to do so, they submitted facts showing the control of the university under a religious creed including the aforementioned by-laws requiring the same (L.F. 199; Vol. III Exh. C, attachment 1, p.1.). They also included the statement of "What Makes an Education Jesuit?" which, in describing the key characteristics of a Jesuit education at SLU states in part:

¹

The only evidence offered was that there was no requirement that the student be Catholic or aspire to the Jesuit ideals.(L.F. 118) This does not disprove religious orientation or control, or the desire to achieve converts, especially since part of the Jesuit education plan is to obtain the "personal conversion" of the student. (Vol. V., Biondi Depo., p. 33-4; Offer of fact No. 11, First Substitute. Brief, p. 54-5)

motivated by the moral, spiritual and religious inspiration and values of the Judaeo-Christian tradition. *will be* guided by the spiritual and intellectual ideals of the Society of Jesus.” (L.F. 199) (Emphasis supplied).

Furthermore, these mandatory by-law provisions are prominently set out on the first page of said by-laws in the very first Article entitled “PURPOSES AND ESSENTIAL PRINCIPLES OF THE UNIVERSITY.”

Finally, at Brief, p. 49, SLU argues that its primary corporate purposes of encouragement of learning and service to the community through means “appropriate to a university in our society” is somehow inconsistent with the carrying out of its mission under “a formalized system of religious beliefs.” The inconsistency is not explained. No suggestion is made as to why even a modern university cannot operate according to religious ideals or a religious creed.

Even if there were an inconsistency in the two by-law provisions, it is not a matter for summary judgment since “a genuine issue exists where the record contains competent materials that evidence two plausible but contradictory, accounts of the essential facts.” *ITT . at 382*.

City points out at Brief, p. 36 that, in *Americans United*, 1.c. 722, in connection with the federal entanglement issue, more liberal treatment is given to institutions of higher learning. . However, *American United* made it clear this did not apply regarding the State “control by religious creed” clause, in view of the specific wording thereof, stating at 538 S.W.2d 1.c. 720

Challengers of the plan submit that the section does not distinguish between schools. With this we agree.

We submit summary judgment was clearly improper.

4. **Menorah does not Support SLU's and City's Reliance thereon under the Facts of the Case-at-Bar**

Menorah Medical Center v. Ashcroft, 584 S.W.2d 73 (Mo banc 1979) has no real relevance regarding the “controlled by a religious creed” issue in the case-at-bar. In *Menorah*, challengers limited their state challenge to the sectarian v. secular issue, 584 S,W,2d l.c. 86. The *Menorah* court gave no indication that *Lemon* should apply to interpreting the “control by religious creed” issue, an issue that wasn’t even in the case.

City makes the argument at brief, p. 33 that “*Menorah* cited *Americans United* for the proposition that the entire *Lemon* test was applicable for considering the state constitutional provisions.” SLU makes a similar contention at Brief, p.. 54. This mischaracterizes *Menorah*’s statement in view of the fact that the “controlled by a religious creed” issue was not in the case. *Menorah* said at 87, “This test (*Lemon*) also has been recognized by Missouri courts” citing *Americans United*. In the context, the obvious reference is to the use of *Lemon* by Missouri courts in the adjudication of federal claims and the sectarian v. secular issue, which is similar in both the federal and Missouri courts.

The above arguments are in addition to and not a retreat from our position that *Menorah* was a plurality of three opinion, the statements of law of which are not controlling. Respondents try to upgrade the plurality opinion in .as an actual holding, arguing that *Menorah* has been cited in several subsequent cases, listing nearly a page of cases, none of which involved the case-at-bar’s establishment clause issues.

At page 54 of SLU’s brief entitled “**Alleged Application of Federal Standards to State Constitution**”, contention is made that even if the trial court reached its decision on a faulty theory, it can be affirmed on any correct theory. However, SLU does not say what this correct theory is, or the case that expounds it. Throughout its brief, SLU’s argument is centered on the conclusionary contention of the “independence” of the Board . We are left to speculate as to what some more “correct theory “ might be.

5. SLU's Freedom of Speech Argument is Untimely and Inappropriate under the Facts of this Case

SLU at Brief , pages 55-57, and City (Brief p. 29-30) suggest that Missouri's strict separation-of-church-and-state clauses could "run afoul of the free speech and free exercise clauses" of the federal First Amendment, being a reason for the court to avoid the constitutional question.

First, SLU made no freedom of speech contention in its trial court Petition (L.F. 21) or its Summary Judgment Motion (L.F. 105), nor did City in its Answer (L.F. 75) or its Summary Judgment Motion (L.F. 84). They should not be made here. *Pippin v. Pippin*, 154 S.W.3d 376, 379 (Mo.App. S.D. 2005)

Second, neither SLU nor City offer facts or suggestions as to how denial of arena TIF money would have any adverse affect on anyone's free speech or right to exercise one's religion. The cases cited by SLU made it clear that the holdings were narrowly limited to findings of actual free speech denials. *Widmar v Vincent*, 454 U.S. 263, 277, (1981)

If the mere building of an arena would implicate federal free speech provisions to the extent that said provisions would trump any state constitutional prohibitions against aid to religiously controlled institutions, practically any activity would be susceptible to a free speech argument.

Third, even if First Amendment free speech were involved, Missouri has a compelling state interest by reason of its own strict church-state separation provisions. *Widmar* stated (l.c. 275) that Missouri courts had not yet ruled the issue However, a federal court *Luetkemeyer v. Kaufmann*, 364 F. Supp.. 376, 386 (WD Mo. 1973), held that "the long established constitutional policy of the State of Missouri . . . is indeed a 'compelling state interest in the regulation of a subject within the State's constitutional

power,’ . . . that such interest may properly be described as an ‘interest of the highest order’. (affirmed by U.S. Supreme Court, 419 U.S. 888 (1974)).

Included in the “free speech” argument is the suggestion that the court not decide the constitutional issue under doctrine that courts can avoid the constitutional issue if the case can be fully determined on another issue. *Ashwander v. TVA*, 297 U.S. 288, 341, 346-48, 56 S. Ct. 466, 480, (1936). No suggestion is made regarding what this other issue might be. Moreover the non-constitutional ground should not be considered for the first time here. *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 7-8. (1993)

City makes the additional suggestion that the application of Art. IX, Sec. 8 might be invalid as running afoul of Art I, Sec. 7 as a discrimination against a church, sect or creed of religion. City did not make this argument of possible unconstitutionality in the trial court. Therefore it cannot make it for the first time on appeal. *Christiansen v. Fulton State Hospital*, 536 S.W.2d 159, 160 (Mo. banc 1976).

Moreover, constitutional provisions are to be construed harmoniously and in a way that both are to be given effect and validity. *State v. Atterbury*, 300 S.W.2d 806, 810 (Mo. banc 1957). City’s suggestion would render Art IX, Sec. 8 an invalid and useless provision in spite of a long tradition of said Section being honored and applied.

A clause that denies public funds to any and all religions is not hostile to religion, but of benefit, in that it keeps the state from meddling in religious affairs. This is a legitimate state policy.

6. City’s Statement that Temple Parties Do not Dispute that the TIF Funding would be Used for Only Secular Purposes is Incorrect.

Although Temple Parties' main thrust is in connection with the creed control issue, yet we do not agree that it has been established that TIF funding will be limited to secular purposes. Father Biondi, himself stated the arena’s importance was “[b]ecause it’s an attractive venue for students from across the United States to come to this campus

to be educated in the Jesuit tradition.” (Emphasis ours). (Vol. III Exh. C p. 77-8)

Moreover, contrary to Respondents’ contentions, there are no restrictions in the ordinances or SLU’s documents (Id. 41) limiting the use of the arena for strictly secular purposes, as provisions do in many establishment cases. Masses are contemplated per SLU’s website. (Id 40). Finally, SLU and its arena is a major beneficiary of this TIF, distinguishing this case-at-bar from other cited cases whereby the recipient was one of a group of many being benefitted by a general law.

Finally, if the main issue in the case is the secular v. sectarian issue (which Respondents contend and Appellants deny) Respondents have utterly failed to make a showing that the ordinances contain guarantees that the TIF aid will not go for sectarian purposes as required in *Tilton v. Richardson*, 403 U.S. 672 and other cases cited in Americans United *Amicus* Brief, to which no satisfactory response has been made by either Respondent. This point was raised in the Court of Appeals (Reply Brief, 9)

7. Issue of Payment from a Public Fund

City, alone, raises the point , “[n]o Missouri case has yet decided whether TIF funding constitutes an ‘appropriation’ or ‘payment’ from a public fund’ for purposes of these constitutional provisions. “ (Brief, p. 25). This is another straw man. No claim was made in Respondents’ pleadings that TIF funding was not an appropriation or payment from a public fund within the terms of said provisions.

Nevertheless, City’s suggestion that TIF funding might not so qualify has no merit. The prohibition of Art. IX, Sec. 8 is against the appropriation or payment “from any public fund anything in aid of any religious creed, “ etc. The securing of and payments on TIF arena bonds is certainly a payment “in aid of” SLU as are the “payment of redevelopment costs and obligations within the redevelopment area.” (Ordinance 65703, Vol. 1, Exh. A, p. 10).. SLU also acknowledges in its brief that it is the intended recipient of TIF funds and that these are to be used for the construction of

a sports arena (Brief, 13, 22, Petition, L.F. 24, Paras. 13, 14).. On its part, City, in its Answer, admitted paragraphs 13 and 14 to the effect that SLU was the intended recipient of arena TIF financing...(L.F. 35, 24).

No contention is made by either Respondent that these are not public funds. Participation by the City in their collection, retention and distribution clearly makes them so. *Mallory v. Barbera* 544 S.W.2d 556, 561 (Mo. banc 1976)

Whether or not PILOTS are technically termed taxes is unimportant as it is sufficient that they are public funds. EATS, which are also involved here are taxes according to their very name, which is Economic Activity Taxes.

C. THE MERITS, FEDERAL ISSUES:

1. Re: Entanglement Issue:. Respondents Fail to Satisfactorily Explain the Absence of any Factual Showing regarding Summary Judgment.

In deciding the establishment clause issues, the trial judge placed reliance on *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (L.F. A12), which case was cited by both parties. Now, on appeal, SLU is suggesting (at Brief, p. 67) that the entanglement issue has been downgraded by the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793, 807-8 (2000). Under *Mitchell* the most important factor is the aid's "neutrality"

As stated in the later case of *Good New Club v. Milford School* 533 U.S. 98, 114 (2001), "[the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."

If the *Mitchell* test is the one to be applied, there is no way that SLU can prevail on summary judgment under this "neutrality" test. The aid under the ordinances here is not "offered to a broad range of groups or persons without regard to their religion", but is offered to SLU, an admitted Catholic University. This is already shown by the record and, even if not, Appellants should have the chance to submit factual materials on this new issue.

Having made the suggestion regarding *Mitchell*, SLU does then proceed (Brief, p. 67-70) to discuss the case on the *Iemon* entanglement theory.

Temple Parties' point in connection with entanglement and the "subsumed" issue is that Respondents did not comply with *Rodgers v. Threlkeld*, 22 S.W.3d 706, 711 (Mo App.W.D. 1999); they did not state with particularity the material facts as supported by the designated affidavits or exhibits. to negate Temple Parties' affirmative defenses in connection with said two issues.

1.) Respondents claim that their pleadings properly denied the statement relied upon by Appellants in their Answer (SLU Brief, 68; City Brief, 43). A mere denial in pleadings is insufficient. . Compliance must be with Rule 74.04(c)(1), *Rodgers v. Threlkeld*, at 711, and said rule requires the statement of facts to be supported by affidavits, exhibits, etc. as does *ITT* at 383-4 This was not done by Respondents.

Here, Respondents did not even indicate in their pleadings, much less by affidavits or exhibits, what they were relying on to negate the affirmative defense of entanglement. Its pleading to which SLU refers (L.F. 91) states, "Saint Louis University denies . . . all allegations referenced in Paragraphs 38-50 of Defendants'/Third Party Plaintiffs' Counterclaim." (Entanglement was 43.). City's denial was similar (L.F. 76). Such general denials do nothing to assist the court in deciding a summary judgment issue. There are 270 pages of legal file and several thousand pages of depositions and other exhibits. The *Rodgers* court refused to perform such a sift and search.

City seeks to claim that *Rodgers v. Threlkeld*, is not applicable to it, on the basis that Temple Parties' pleading as to City was not an Answer's affirmative defense, but an original pleading (Brief 43.). First, it still remained an affirmative defense regarding SLU. Second, as to City, this is a distinction without a difference. Either as to SLU or City, Temple Parties' factual allegations must be countered by factual submissions of their opponents.

City argues it did not have to make such submissions on the claimed ground that Temple Parties pleading was of “excessive entanglement” which is a conclusion, not a fact. However, what was pleaded, para. 31 at L.F. 42, para. 43 at L.F. 46 and para. 99 at L.F. 63, consisted of the facts leading to the entanglement conclusion.

SLU suggests that it should be excused from compliance with the factual submission requirement by utilization of the possible escape hatch mentioned in *Rodgers* in certain situations where it is otherwise “clear to [the] court and readily ascertainable from the record the facts on which the respondents were relying to negate the appellants’ affirmative defense.” (Brief, 68). SLU has omitted the last eleven words of the court’s quoted sentence which are “without requiring this court to become an advocate for the respondents”, 22 S.W.3d l.c. 711., also stating “[i]t is not the function of an appellate court to sift through a voluminous record . . .”

Alternately, we will nonetheless discuss the merits of their various points.

Respondents continue to rely on *Menorah*. A controlling facet for the *Menorah* plurality was as stated at 584 S.W.2d l.c. 87, “We reiterate our earlier conclusion that the state is not the financing mechanism. “ SLU (Brief, 50) states that TIF notes “are *not* debts of the City of St. Louis” citing Ordinance 65858, pp 10-11. At our First Substitute Brief, pages 58-62, the ordinances are set out at great length conclusively showing that the City is the financing mechanism contrary to *Menorah*. These ordinances show SLU fails the *Menorah* requirement of having the project rely on income generated by the projects own rents. As shown in the previous brief, the TIF relies on taxes from the community which are to be paid involuntarily to a religious university.

These references are ignored by SLU in its Brief. They are almost completely ignored by City. City’s only response is that it is the TIF Commission that is the one principally involved with the expenditure of the funds, making no reference to the ordinance provisions cited by Temple Parties and without any designation to the record

or the ordinances involved where the TIF Commission might be found being involved with expenditures. .

City's other argument is that the claimed interaction will be no more than that which is involved in the government's collection of taxes, this argument, again, being without the submission of factual matters. Regular taxes are based mainly on mathematical calculation regarding income. This is not so with this TIF, with competing interests involved as shown in our first Brief.

The City's actual plan of operation should be brought into evidence as well as expert testimony regarding the necessity for interaction regarding the assessment and collection of the TIF revenue. Perhaps, realizing its burden to produce some evidence of the collection process negating entanglement, City at Brief, p. 37 states certain "facts" in order to show absence of entanglement. However, again contrary to Rule 84.04(i), no reference is made to the record.

Nothing in *Lemon* or its progeny, including *Mitchell v. Helms*, 530 U.S. 793, indicates that a situation, such as in the case-at-bar, is, *ipso facto*, free of entanglement. Said cases discuss a plethora of different factors in connection with entanglement.

SLU cites (Brief, 51-2) nineteen federal cases, most being very fact-oriented.

Many cases re

[t]he provision of benefits to so broad a spectrum of groups is an

import

The court noted that in those cases where "the public assistance . . . was provided only to parents of children in non-public schools", it was struck down (l.c. 398-399).

With the TIF Ordinance, SLU is not simply in a class limited to a suspected category of religious recipients, but is the major recipient.

None of SLU's nineteen cases involved a clause requiring the university to be run under Jesuit doctrine.

2. Re: The "Subsumed" Issue of Hunt v. McNair. Respondents Fail to Satisfactorily Explain the Absence of any Factual Showing regarding Summary Judgment.

Again, SLU's claim, Brief, p. 72, that it countered Temple Parties' pleading of "subsumed in the religious mission" facts, by its own pleading. is contrary to *ITT* at 378.

SLU's only reference to facts is its later statement, (Brief, p. 73) "As set forth throughout this Brief, the record is replete with facts which support a finding that Saint Louis University's functions are not subsumed in its religious mission", making no designation to the record, a non-compliance of Rule 84.04(i).d. and *Rodgers v. Threlkild*, supra.

City cites *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976). The case is more support for Appellant than Respondents. It cites six categories of facts on the religious-non-religious issue in arriving at its decision (City brief, page 49), demonstrating clearly that "subsumed" is a fact oriented issue.

Temple Parties did not have their day in court on the "subsumed" issue.

D. REPLY ARGUMENT TO BRIEF OF AMICUS CURIAE,

The brief of *Amicus Curiae*, Center for Law and Religious Freedom, is not in compliance with this Court's Rules for briefs. First, *Amicus'* brief fails to contain headings identifying the points relied on contained in the Appellants' brief to which each such argument responds, contrary to . Rule 84.04(f), second paragraph. Second, each of *Amicus'* Points is merely an abstract statement of law, contrary to Mo. Civ. Rule 84.04(d)(4).

Alternately, Temple Parties will respond to same as best they can.

The statement, "Missouri's Constitution has to be applied so as not to conflict with the federal law" is without citation of authority and is incorrect even as an abstract statement of law. Missouri law does not have to be consistent with federal law so long

as the particular area has not been preempted as federal Religion has not been. This Court has said, “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.” *Harfst v. Hoegen*, 163 S.W.2d 609.611 (Mo. banc 1942).

Freedom of speech is one area where federal constitutional law is dominant. The principal case cited by *Amicus* in its Section 1, *Widmar v. Vincent*, 454 U.S. 263 is a freedom of speech case. Any thought to apply *Widmar* to the case-at-bar fails because ours is not a freedom of speech case.

Additionally, the basis for *Widmar*’s holding. is the violation of the Federal First Amendment by a state’s attempt to regulate speech. 454 U.S. l.c. 275-6. This is foreign to the issues raised by Respondents in the case-at-bar, based on secular v. sectarian. Moreover, *Amicus*’ point that the Missouri law was contrary to federal constitutional law is a constitutional challenge, which was not made at the earliest opportunity

CONCLUSION

For the above reasons it is requested that the case be reversed in accordance with the prayer in our first Brief.

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

The undersigned certifies that this Brief complies with the limitations contained in Rule 84.06 (b) and (c) and that the number of words in the Brief are 7750. The undersigned relied on the word 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.

James A. Stemmler 15964

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 delivering same this 1st day of February, 2007 to a clerk or secretary in the office of

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