IN THE SUPREME COURT OF MISSOURI

Appeal No. SC 88075

SAINT LOUIS UNIVERSITY, et al.,

Respondents,

v.

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

Appellants.

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

SUBSTITUTE BRIEF OF RESPONDENT SAINT LOUIS UNIVERSITY

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STATEMENT OF FACTS

Appellants' Statement of Facts omits much of the record evidence about the purposes of the Tax Increment Financing ordinances that are at issue in this case, and about the governance and purposes of Saint Louis University. The University therefore provides this more complete and accurate statement pursuant to Mo. R. Civ. P. 84.04(f).

A. Saint Louis University

Saint Louis University 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 ("Ex. Vol. II"), at ¶ 2). The University traces its history to 1818 when St. Louis Academy was established in downtown St. Louis. It was incorporated by Act of the Missouri General Assembly in 1832. (Legal File ("LF"), at p. 24, ¶ 12; p. 40, ¶ 12; Biondi Affidavit, Ex. Vol. II, at ¶ 4). In 1876, looking to expand but wanting to stay in the City of St. Louis, Saint Louis University purchased land for a new campus near Grand Avenue and Lindell Boulevard. (Id.). It remains in operation there today. The St. Louis campus of the University now consists of approximately 127 buildings on approximately 217 acres. (Id.). It is an anchor to the midtown area of the City.

In the 1940s, '50s and '70s, the University was recruited to leave the City of St. Louis and move to St. Louis County. In every instance, University officials remained committed to the City of St. Louis. (Id.). The improvements and expansions to Saint Louis University's campus in the City have totaled nearly $500 million since 1987. (Id.).

Saint Louis University is a corporation organized for higher educational purposes by the State of Missouri. As a result of changes in its corporate structure, the University is not now owned or controlled by the Society of Jesus. Rather, under its charter, the government of the University's corporate affairs is vested in a self-perpetuating Board of Trustees. (Saint Louis University Bylaws ("Bylaws"), Exhibits to Legal File, Volume III ("Ex. Vol. III"), attached to Deposition of Lawrence Biondi, at Article I, ¶ 1).

The University's Board of Trustees is an independent, corporate lay-majority board. (Biondi Affidavit, Ex. Vol. II, at ¶ 3). It consists of no fewer than 25 members and no more than 55 members. No fewer than six but no more than 12 of the members of the Board may be members of the Society of Jesus. (Id.; Bylaws, Ex. Vol. III, at Article II, § 1). The bylaws 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 (unless a greater vote is specified). (Biondi Affidavit, Ex. Vol. II, at ¶ 3; Bylaws, Ex. Vol. III, at Article II, § 2).

At the time of summary judgment, the University's Board of Trustees consisted of 42 trustees, of whom nine were Jesuit. (Biondi Affidavit, Ex. Vol. II, at ¶ 3). The Board is comprised of people of all faiths and people with no particular religious affiliation. (Deposition of Lawrence Biondi ("Biondi Depo."), Exhibits to Legal File, Volume V ("Ex. Vol. V"), at p. 13, ll. 15-21). All officers of Saint Louis University (including its President) serve "at the pleasure" of the Board of Trustees. (Bylaws, Ex. Vol. III, at

Article III, § 2). The Board of Trustees also has explicit authority to amend and/or revoke the bylaws, in whole or in part. (Bylaws, Ex. Vol. III, at Article VII).

Saint Louis University is not owned by the Catholic Church or by the Catholic Archdiocese of St. Louis. (Biondi Affidavit, Ex. Vol. II, at ¶ 3). The University's Board of Trustees is not controlled by the Catholic Church, the Archdiocese, or any other church. (Id.). One example of a recent important action undertaken by Saint Louis University's Board of Trustees was its decision to sell Saint Louis University Hospital to Tenet Healthcare in 1998, despite the strong and well-publicized objections of the Archbishop of St. Louis. (Biondi Depo., Ex. Vol. V, at p. 24, ll. 1-11).

Saint Louis University has a tradition that aspires to Jesuit philosophies and ideals. According to its bylaws at the time the trial court granted summary judgment, the President of the University was required to be a Jesuit. (Bylaws, Ex. Vol. III, at Article III, § 3).[1] That office is now held by Reverend Lawrence Biondi. Despite its Jesuit tradition, however, Saint Louis University does not require its employees and/or students to aspire to Jesuit ideals, to be Catholic or to otherwise have any specific religious affiliation. (Biondi Affidavit, Ex. Vol. II, at ¶ 2). Of the 1,275 faculty/staff members at the University, fewer than 35 are Jesuit (which equates to approximately 2.7%). (Biondi Affidavit, Ex. Vol. II, at ¶ 3). Fewer than half the students who attend

[1] Pursuant to a recent amendment to Saint Louis University's Bylaws, the University's President is no longer required to be a Jesuit.

Saint Louis University identify themselves as Catholic. (Biondi Depo., Ex. Vol. V, at p. 31, ll. 16-19).

As provided in its bylaws, Saint Louis University is identified as a Catholic university. (Bylaws, Ex. Vol. III). In defining the "ideals" of Saint Louis University's Jesuit tradition, President Biondi testified as follows:

> [O]ur philosophy is basically 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, to take the kind of things that they have learned…and to take those principles of education and to live them out in their society to make changes in their workplace and to improve the society in which…they live.
>
> (Biondi Depo., Ex. Vol. V, at p. 12, ll. 12-21).

According to its bylaws, the University's primary corporate purposes are as follows:

> 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.

(Bylaws, Ex. Vol. III, at Article I, ¶ 2).

B. The St. Louis City TIF Ordinances

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 initiated design and construction planning for an arena to be used for sporting events, graduation ceremonies and other appropriate secular uses benefiting Saint Louis University's students, the City of St. Louis and the Metropolitan St. Louis Community (the "Arena"). (LF p. 24, ¶ 13; p. 40, ¶ 13; Biondi Affidavit, Ex. Vol. II, at ¶ 5).[2]

To finance a portion of such a significant addition to the area, the 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. § 99.800 *et seq* (the "Missouri TIF Act"). (LF pp. 24-25, ¶ 14; pp. 40-41, ¶ 14; Biondi

[2] Pursuant to the redevelopment plan approved by the Board of Aldermen of the City of St. Louis, the Arena was specifically intended to "host a variety of functions, including plays, concerts, cultural events, community events, speakers, trade shows, academic conferences, commencements and sporting events." (St. Louis City Ordinance 65703, Exhibits to Legal File, Volume I ("Ex. Vol. I"), at § A, pp. 59-60).

Affidavit, Ex. Vol. II, at ¶ 6). This Court has explained the mechanics and operation of the Missouri TIF Act as follows:

> The Act permits a municipality to create a tax increment financing commission, the actions of which are subject to the final approval of the governing body of the municipality. Section 99.820(11). The Commission may adopt a redevelopment plan, the purpose of which is "to reduce or eliminate those conditions, the existence of which qualified the redevelopment project area as a blighted area, conservation area, economic development area, or combination thereof, and to thereby enhance the tax bases of the taxing districts" within the project area. Section 99.805(8). The plan must set forth in writing, among other things, details as to estimated redevelopment project costs, and the source and nature of the funds to finance such costs. In addition, the plan must provide an estimate of the equalized assessed valuation after redevelopment and the general end uses to apply in the redevelopment project area. No plan may be adopted without the municipality finding, among other things, that the redevelopment project area is a blighted area or a conservation area as defined in Section 99.805 and that the area is neither subject to, nor is it reasonably anticipated that it will be subject to growth through investment by the private sector. Section 99.810.
>
> The Act empowers a municipality to acquire real property "reasonably necessary to achieve the objectives of the redevelopment plan

and project" by eminent domain and to convey to private ownership the real property obtained through the condemnation process in order to effectuate the redevelopment plan. Section 99.820(3). The acquisition of real property is a permitted "redevelopment project cost." Section 99.805(11)(c). To provide funding for the acquisition of property and other permitted project costs, a municipality is authorized to issue "[o]bligations secured by the special allocation fund…for the redevelopment project area…to provide for redevelopment project costs." Section 99.835.1. The Act contemplates that improvements in the district will result in an increased assessed valuation of the property within the redevelopment area. Thus, each year that the post-plan assessed value of the taxable real property within the redevelopment project area exceeds the pre-plan assessed value, taxes on the *increase* in assessed value are abated. In place of taxes, the taxpayer makes payments in lieu of taxes (PILOTS). The PILOT is equal to the amount of tax that would have been collected on the increased assessed valuation of the property after improvements. The PILOTS are paid into the special allocation fund which is pledged as security for the bonds issued by the municipality. Section 99.835.1.

Surplus funds in the special allocation fund are distributed annually to the taxing districts in the redevelopment project area. Ad valorem taxes collected on the pre-plan assessed value of the project property are paid to the respective taxing districts. When the bonds are retired, the entirety of

the post-plan assessed valuation of the property is "levied, collected, and distributed in the manner applicable in the absence of the adoption of tax increment financing." Section 99.850(2).

Tax Increment Financing Commission of Kansas City v. J.E. Dunn Construction Co., Inc., 781 S.W.2d 70, 73 (Mo. banc 1989).

Missouri TIF assistance for the Saint Louis University Arena was established by St. Louis City Ordinances 65703, 65857 and 65858 (the "TIF Ordinances"). (Id.).

The Board of Aldermen of the City of St. Louis enacted Ordinance 65703 on November 15, 2002. The ordinance (1) designates a portion of the City as a "redevelopment area" pursuant to the Missouri TIF Act; (2) approves a redevelopment plan; (3) adopts tax increment financing within the redevelopment area; and (4) establishes a special allocation fund related thereto. (LF p. 25, ¶ 15; p. 41, ¶ 15; St. Louis City Ordinance 65703, Ex. Vol. I, at § A).

The Board of Aldermen enacted Ordinance 65857 on February 25, 2003. (LF p. 25, ¶ 16; p. 41, ¶ 16; St. Louis City Ordinance 65857, Ex. Vol. I, at § B). Ordinance 65857 amends Ordinance 65703 and explicitly adopts a proposed agreement submitted by Grand Center, Inc. to redevelop the redevelopment area established in Ordinance 65703. (Id.).

Ordinance 65858 was also enacted on February 25, 2003. (LF p. 25, ¶ 17; p. 41, ¶ 17; St. Louis City Ordinance 65858, Ex. Vol. I, at § C). Ordinance 65858 authorizes and directs the issuance and delivery of tax increment revenue notes not to exceed

$80,000,000 in principal amount as related to all of the Grand Center redevelopment projects. (Id.).

Relying on the TIF Ordinances, the University has committed millions of dollars and countless hours in planning and beginning the construction of the Arena. (LF p. 26, ¶ 19; p. 41, ¶ 19; Biondi Affidavit, Ex. Vol. II, at ¶ 7). Without the assistance of eminent domain, the University acquired all the property necessary to construct the Arena. (Id.). It purchased the final parcel of land for the Arena (the former Waring Elementary School, which was closed and vacated by the St. Louis Public School District) on November 25, 2003, at a cost of over one million dollars. (Id.).

The Arena site work has been completed, including demolition, subsurface testing, surveying, utility location, and environmental testing. (Id.). The Arena architectural design plans are substantially complete, with design and pre-construction expenditures totaling in excess of two million dollars. (Id.). Mackey Mitchell Associates began design work for the Arena in May 2003; Alberici Constructors was originally selected as general contractor in May 2003; and, later, Clayco Construction Company, Inc. was named general contractor for the project.[3] (Id.). Since February 2003, a substantial capital campaign has been in progress and substantial funds have been raised, although the campaign's goals have yet to be met. (Id.). Saint Louis University has had and

[3] Since the completion of proceedings in the trial court, the Arena design has been refined. The Arena's present design plan calls for approximately 10,000 seats and now includes athletic practice facilities.

anticipates additional donors of one million dollars or more and is currently marketing the naming rights and other corporate sponsorships for the Arena. (Id.).

C. The Lawsuit

Litigation over validity of the TIF ordinances began in federal court.[4] In a lawsuit filed in the United States District Court for the Eastern District of Missouri (Cause No. 4:04CV01387CEJ) against the City and others, the same parties who are appellants here challenged the validity of the TIF Ordinances under a number of state and federal constitutional provisions, as well as 42 U.S.C. § 1983. (LF pp. 27-28, ¶¶ 20-21; p. 41, ¶¶ 20-21).[5] The plaintiffs in that case chose not to name Saint Louis University as a defendant. (Id.).

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[4] The federal lawsuit, brought in the name of the Masonic Temple Association of St. Louis and others, was initiated and financed by Philip Estep, a real estate developer who would receive the benefit of at least five real estate development projects within the TIF district if the TIF Ordinances were found invalid. (Deposition of Philip Estep ("Estep Depo."), Volume I, Ex. Vol. V, at p. 27, l. 14 - p. 30, l. 20; p. 284, l. 20 - p. 292, l. 16). Further, Mr. Estep admitted that he believes that the Masonic Temple would not have approved this lawsuit if he was not responsible for the costs. (Id., at p. 106, ll. 9-14).

[5] In the federal lawsuit, in addition to the challenges under the Missouri Constitution, Appellants also challenged the validity of the TIF Ordinances under (i) the Establishment Clause of the First Amendment to the U.S. Constitution; (ii) the Due

To obtain a resolution of the dispute over validity of the TIF Ordinances, the University filed the present declaratory judgment action in the Circuit Court for the City of St. Louis. It named as defendants The Masonic Temple Association of St. Louis, Design Forum, Inc., Frederick Medler, Jo Ann Keeney, Barbara Arras and Janese Henry ("Appellants"). The University asked the Court to declare that the TIF Ordinances did not violate (i) the Missouri State Establishment Clause (Article IX, § 8 and Article I, § 7 of the Missouri Constitution); (ii) the Missouri State Procedural Due Process Clause (Article I, § 10 of the Missouri Constitution); (iii) the Missouri State Equal Protection Clause (Article I, § 2 of the Missouri Constitution); (iv) the Missouri State Contract Clause (Article I, § 13 of the Missouri Constitution); (v) the Missouri State Inalienability of the Power to Tax Clause (Article X, § 2 of the Missouri Constitution); or (vi) the Missouri State "Sunshine Laws" (Mo. Rev. Stat. § 610.010 *et seq.*) and that the TIF Ordinances were therefore valid and enforceable. (LF pp. 21-33).

After the filing of the University's declaratory judgment action, the state court became the forum for adjudication of all challenges to the TIF Ordinances. On motion of

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Process Clause of the Fourteenth Amendment to the U.S. Constitution; (iii) the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; (iv) the Contract Clause of Article I, § 10 of the U.S. Constitution; (v) the Commerce Clause of the U.S. Constitution; (vi) the Free Speech Clause of the First Amendment to the U.S. Constitution; and (vii) 42 U.S.C. § 1983.

the defendants in the federal case, that suit was dismissed without prejudice for reasons of comity and deference to the state court proceeding. (LF p. 262).

Appellants filed an Answer and Counterclaim in the case at bar. Count I of the Counterclaim sought a declaration that the TIF Ordinances violated the same Missouri constitutional provisions and statutes for which Saint Louis University sought a declaration of validity. Count II of Appellants' Counterclaim sought a declaration that the TIF Ordinances violated the Establishment Clause of the First Amendment to the U.S. Constitution. Count III of the Counterclaim alleged a violation of 42 U.S.C. § 1983. (LF pp. 38-74).

The University moved to dismiss and/or for summary judgment. (LF pp. 105-112). The City of St. Louis also moved for summary judgment. (LF pp. 84-86). Discovery was completed. Appellants did not request a continuance to conduct additional discovery as permitted by Missouri Rule of Civil Procedure 74.04, nor did they indicate a need to engage in any additional discovery regarding the issues set forth in the motions filed by Saint Louis University and the City of St. Louis. Rather, Appellants filed their own Motion for Judgment on the Pleadings. (LF pp. 188-197). On July 14, 2005, the trial court issued its Order and Judgment granting summary judgment in favor of the University and the City and declaring that the TIF Ordinances do not violate any provisions of the Missouri or U.S. Constitutions or any Missouri or U.S. statute. (LF pp. 240-258).

Appellants appealed only those portions of the trial court's Order and Judgment that held that the TIF Ordinances did not violate Article IX, § 8 and/or Article I, § 7 of

the Missouri Constitution and the Establishment Clause of the First Amendment to the U.S. Constitution. (LF pp. 266-267).

The case was argued and submitted to a panel of the Court of Appeals, Eastern District. In an opinion entered on October 3, 2006, two of the three judges of that Court stated that they would affirm the trial court's grant of summary judgment to the University and the City, but ordered that the appeal be transferred to this Court under Rule 83.02. The third judge concurred in the Rule 83.02 transfer, but stated that he would reverse the grant of summary judgment on the basis that further proceedings in the trial court were necessary before the merits could be determined.

POINTS RELIED ON

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT THAT THE TIF ORDINANCES DO NOT VIOLATE THE CONSTITUTION OF MISSOURI, BECAUSE THE TIF FUNDS WILL NOT BE USED FOR A SECTARIAN PURPOSE, SAINT LOUIS UNIVERSITY IS NOT CONTROLLED BY THE CATHOLIC CHURCH OR ANY OTHER RELIGIOUS ORGANIZATION OR CREED, AND THE CATHOLIC VALUES AND JESUIT TRADITION OF SAINT LOUIS UNIVERSITY DO NOT DISQUALIFY IT AS A RECIPIENT OF PUBLIC FUNDS UNDER ARTICLE I, § 7 AND ARTICLE IX, § 8 OF THE MISSOURI CONSTITUTION.

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

Menorah Medical Center v. Health and Educational Facilities Authority, 584 S.W.2d 73 (Mo. banc 1979)

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT THAT THE ORDINANCES DO NOT VIOLATE THE FIRST AMENDMENT ESTABLISHMENT CLAUSE BECAUSE THE RECORD AMPLY SUPPORTS A FINDING THAT THERE WAS NO EXCESSIVE ENTANGLEMENT BETWEEN THE STATE AND CHURCH AFFAIRS AND THERE WAS NO EVIDENCE RELIGION IS SO PERVASIVE AT SAINT LOUIS UNIVERSITY THAT A SUBSTANTIAL PORTION OF ITS FUNCTIONS ARE SUBSUMED IN THE RELIGIOUS MISSION.

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

Hunt v. McNair, 413 U.S. 734 (1973)

SUMMARY OF ARGUMENT

Saint Louis University is an independent Missouri benevolent corporation. It is managed by an independent corporate Board of Trustees with members of varying religious faiths and some with no religious affiliation. The corporation operates a nationally recognized university. The University's faculty members, also from varying religious and philosophical backgrounds, teach a diverse student body and conduct research. They do so in an atmosphere of open inquiry and academic freedom.

This case presents the question whether such a university is disqualified from the receipt of TIF funds that are being made available for secular purposes, simply because the university has a Jesuit as president and identifies itself as a "Catholic university" with a Jesuit tradition. Under a proper reading of the provisions of the Missouri Constitution at issue here, Article I, § 7 and Article IX, § 8, Saint Louis University is not so disqualified. Likewise, a proper reading of the First Amendment Establishment Clause and controlling decisions of the Supreme Court of the United States interpreting that clause leads to the conclusion that the TIF Ordinances are lawful under the United States Constitution.

The state constitutional provisions in question prohibit use of public funds for any "religious creed, church or sectarian purpose," Article IX, § 8, and prohibit payments to "any church, sect or denomination of religion." Article I, § 7. Dealing specifically with educational institutions, the Constitution prohibits the payment of public funds to any institution of learning "controlled by any religious creed, church or sectarian denomination." Article IX, § 8.

The decisions of this Court interpreting these provisions permit a university with a religious affiliation to receive generally available public funds, particularly where, as here, the funds are used for secular purposes and the university is governed by an independent corporate board. To the extent the state constitutional provisions prohibit the expenditure of public funds for religious purposes, they do not render the City's TIF Ordinances invalid. The TIF funds here are not being used for a "religious creed, church or sectarian purpose," but for the proper public purpose of redeveloping a blighted area by construction of a sports arena. The TIF Ordinances were supported by the TIF Commission following a public hearing and were adopted because the Board of Aldermen of the City of St. Louis found it to be in the public interest to use TIF funding to assist in the redevelopment of blighted areas in midtown St. Louis.

Likewise, to the extent the state constitutional provisions prohibit payments of public funds to institutions under control by a "religious creed, church or sectarian denomination" even if the funds are used for secular rather than religious purposes, they do not render these ordinances unconstitutional. Under *Americans United v. Rogers*, 538 S.W.2d 711, 721 (Mo. banc 1976), a religiously affiliated university is not subject to the sectarian control prohibited by the Missouri constitution if it is governed by an independent board and is not under the control of any church, denomination or religious creed. Saint Louis University's participation in the TIF redevelopment district meets the standard established by *Americans United*. The University is wholly independent of the Catholic Church and governed by an independent corporate board. In fact, the University has been previously held by this Court to be a legal recipient of funds under Missouri

state programs. *Menorah Medical Center v. Health and Educational Facilities Authority*, 584 S.W.2d 73, 86-87 (Mo. banc 1979). While it identifies itself as Catholic, and its governing documents contain general aspirations to religious ideals, this does not mean that Saint Louis University is under the "control" of a "religious creed" as defined by the Missouri Constitution. The TIF Ordinances are thus lawful under the Missouri Constitution.

Appellants' First Amendment Establishment Clause arguments are likewise meritless. The TIF Ordinances do not give rise to "excessive entanglement" of the state with religion in contravention of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Saint Louis University is not so dominated by a religious mission as to be "pervasively sectarian" under the rule of *Hunt v. McNair*, 413 U.S. 734 (1973). Arguments advanced by the *amici curiae* Americans Civil Liberties Union and Americans United for the Separation and Church and State, while formulated differently from the arguments advanced by Appellants, are similarly without merit. An ordinance that provides funds to assist in a single construction project that benefits the public as a whole and has only a non-religious purpose -- a sporting arena -- does not establish a religion, even if the institution building the arena has a religious affiliation.

The grant of summary judgment to the University should be affirmed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT THAT THE TIF ORDINANCES DO NOT VIOLATE THE CONSTITUTION OF MISSOURI, BECAUSE THE TIF FUNDS WILL NOT BE USED FOR A SECTARIAN PURPOSE, SAINT LOUIS UNIVERSITY IS NOT CONTROLLED BY THE CATHOLIC CHURCH OR ANY OTHER RELIGIOUS ORGANIZATION OR CREED, AND THE CATHOLIC VALUES AND JESUIT TRADITION OF SAINT LOUIS UNIVERSITY DO NOT DISQUALIFY IT AS A RECIPIENT OF PUBLIC FUNDS UNDER ARTICLE I, § 7 AND ARTICLE IX, § 8 OF THE MISSOURI CONSTITUTION. [RESPONDS TO APPELLANTS' POINTS RELIED ON I, II III AND IV].[6]

Standard Of Review

Appellate review of an order granting summary judgment is essentially de novo. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The criteria on appeal for testing the propriety of summary

[6] Appellants' first four points relied on are attacks on the legal validity of the TIF financing under the same two provisions of the Constitution of Missouri, Article I, § 7 and Article IX, § 8. Appellants' arguments overlap. Respondent addresses all four of Appellants' points in this first section of its argument, pointing out, where applicable, what points and arguments of Appellants are being responded to.

judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. Id.

Summary judgment should be entered on behalf of a moving party when there is no genuine issue as to any material fact and when the movant is entitled to judgment as a matter of law. *Cook v. Atoma International of America, Inc.*, 930 S.W.2d 43, 45 (Mo.App.E.D. 1996). Once a movant has met this burden, the non-movant's only recourse is to show -- by affidavit,[7] depositions, answers to interrogatories or admissions on file -- that one or more of the material facts shown by the movant is, in fact, genuinely disputed. *ITT Commercial Finance Corp.*, 854 S.W.2d at 381. A genuine issue as to a material fact is a dispute that is real, not merely argumentative, imaginary or frivolous. Id. A material fact is a fact which has legal probative force as to a controlling issue. *Hallmark v. Haenni*, 904 S.W.2d 31, 33 (Mo.App.E.D. 1995).

Although appellate review of an order granting summary judgment is essentially de novo, such an order may be affirmed under any theory that is supported by the record. *In re Estate of Blodgett v. Mitchell*, 95 S.W.3d 79, 81 (Mo. 2003). Thus, an appellate court should consider every possible legal theory under which the trial court's judgment may be sustained. *Jennings v. City of Kansas City*, 812 S.W.2d 724, 728 (Mo.App.W.D.

[7] If the non-movant believes it needs more facts or needs to conduct discovery, it is required to file an affidavit under Missouri Rule of Civil Procedure 74.04(f) to set forth specifically why and what they will show through more discovery. No such affidavit or request for more time to conduct discovery was made by Appellants.

1991). This is true even if the reason for affirming the trial court's entry of summary judgment is different from the reason given by the trial court for granting summary judgment. Id.

The ordinances at issue here, which were found valid by the trial court, come to this Court with a strong presumption of constitutionality. Missouri state statutes and municipal ordinances are presumed valid. A statute or ordinance will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision. *Americans United v. Rogers*, 538 S.W.2d 711, 716 (Mo. banc 1976). Legislative enactments should be recognized and enforced by the courts as embodying the will of the people unless they are plainly and palpably a violation of the fundamental law of the constitution. Id.

The Constitutional Provisions

The two Missouri constitutional provisions at issue trace their origins to the 1870's. Both are taken verbatim from the Constitution of 1875. Article I, § 7 of the present Missouri Constitution (which appeared as Article II, § 7 of the 1875 Constitution) states, in pertinent part, as follows:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion…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.

Similarly, Article IX, § 8 of the present Constitution (which was Article XI, § 11 of the 1875 Constitution) provides, in pertinent part, as follows:

> Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever…[8]

These amendments have a historical context, which the Supreme Court of Missouri has acknowledged. *Oliver v. State Tax Commission*, 37 S.W.3d 243, 251 (Mo. 2001). Similar provisions restricting the use of public funds for religious or "sectarian" purposes are found in the constitutions of many states. Most (like Missouri's) date from the latter half of the nineteenth century. Some writers have asserted that these provisions, known generally as "Blaine Amendments," resulted from nativist and anti-Catholic bias. Statements to that effect have been made by justices of the United States Supreme Court on both sides of that Court's ongoing Establishment Clause debates. See *Zelman v.*

[8] The 1875 counterpart to the present Article IX, § 8 was in turn derived from Article IX, § 10 of the 1865 Constitution, added by amendment in 1870, which contained language very similar to that in the current constitution. 28 Mo.Rev.Stat. Annot. (1939) at 299.

Simmons-Harris, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting); *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (Thomas, J. plurality opinion).

Some authors have argued that state constitutional provisions like those here are suspect under the federal constitution because of their origins. Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. Ann. Surv. Am. L. 413 (2003). Other writers suggest that the motivations for the provisions were not uniformly anti-Catholic and nativist, and that their origins are largely irrelevant in interpreting them today. Goldenzeil, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denv. U.L. Rev. 57 (2005).[9] The Missouri provisions have their own unique history. Hoey, *Missouri Education at the Crossroads: The Phelan Miscalculation and the Education Amendment of 1870*, 95 Mo. Hist. Rev. 372 (2001).

There is a substantial body of case law interpreting these provisions of our state's Constitution, from *Harfst v. Hoegen*, 163 S.W.2d 609, 614 (Mo. 1942) through *Americans United v. Rogers*, 538 S.W.2d 711, 721 (Mo. banc 1976), *Menorah Medical Center v. Health and Educational Facilities Authority*, 584 S.W.2d 73, 86-87 (Mo. banc

[9]This Court has not been presented with challenges to these amendments based on federal constitutional grounds. The term "Blaine Amendments" is derived from Representative James G. Blaine, who in 1875 introduced in the House of Representatives a proposed amendment to the United States Constitution that, *inter alia*, would have prohibited public funding of sectarian education. The amendment was not adopted.

1979), and *Oliver v. State Tax Commission*, *supra*. These decisions establish the lawfulness of the TIF Ordinances under Article I, § 7 and Article IX, § 8. Under the Missouri Constitution as this Court has interpreted it, a university with an independent board may take advantage of generally available public funds if it uses those funds for secular purposes, even if the university has a general religious philosophy or orientation. This alone is sufficient to support affirmance of the trial court's judgment. A university does not have to demonstrate it is based entirely on secular ideals and without religious affiliation in order to receive generally available public funds. Larger questions going to the validity of these constitutional provisions in light of their origins, or their proper application in a grade school or secondary school setting, are not now before this Court.

Interpreting the Text of the Constitutional Articles

The starting point for any constitutional analysis is the text of the constitutional provisions themselves. "The meaning conveyed to the voters is presumptively the ordinary and usual meaning given the words of the provision." *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002).

Article I, § 7 and Article IX, § 8 overlap. Taken together, they contain two types of restrictions on the appropriation of public funds: restrictions as to the purpose of appropriations, and restrictions as to the identity of recipients of appropriations. The restrictions as to purpose are embodied in the language of Article IX, § 8 forbidding appropriations "in aid of any religious creed, church or sectarian purpose." The restrictions as to identity of recipients are found in both sections. Article I, § 7 provides generally that public funds may not be used "in aid of any church, sect or denomination

of religion." Article IX, § 8 contains a restriction on the identity of recipients that is more specific to schools: public funds may not be used "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 . . ." (emphasis added).

Restrictions as to Purpose

The restrictions as to purpose of appropriations need not detain this Court long. The record reflects, as the trial court held, that the Board of Alderman of the City of St. Louis adopted the TIF Ordinances for the proper public and secular purpose of redeveloping a blighted area of the City. (LF p. 250, ¶ 8). The importance of Saint Louis University as a stable anchor in midtown St. Louis is well-established. The City's grant of TIF benefits to Saint Louis University has been determined by the Board of Alderman to be in the public interest. The ordinances specify purposes for the TIF funds that are entirely secular, including the development of theaters, museums, parking, green space, educational and housing projects, retail and mixed-use establishments, historic rehabilitation, and arena projects. (Id.) The funds to be allocated to Saint Louis University are to be used towards construction, which includes sewers, sidewalks, traffic control, utility relocation and other public infrastructure improvements, of a sports arena, a secular purpose, and the use of such funds on the project is controlled by the State's TIF statute. Thus, the TIF Ordinances serve valid public purposes, not sectarian ones. The Arena planned by Saint Louis University is but one of many projects in the TIF redevelopment area.

This is not a case, then, where public funds are to be used "in aid of any religious creed, church or sectarian purpose" in contravention of Article IX, § 8. Indeed, in their many arguments, Appellants do not seriously argue otherwise. The most they contend is that the TIF funds will serve a religious purpose by making Saint Louis University more attractive to students so that they can be educated "in the Jesuit tradition." (Appellants' Substitute Brief at 30). Any payment to a religiously affiliated university could be said to make the university more attractive. Such a general purpose is not disqualified under the state constitution. It does not turn a purely secular purpose into a religious one.

Appellants' real argument is that the TIF Ordinances' secular purpose in itself is not sufficient to establish the legality of the planned project. (Appellants' Substitute Brief at 39-40). Regardless of any public purpose, Appellants contend, the TIF Ordinances are unconstitutional merely because the funds are to be used "to help to support or sustain" Saint Louis University. (Id.) Appellants thus primarily invoke the Constitution's restrictions as to the identity of the recipients, not the restrictions as to use of the public funds.

Restrictions as to Recipients

Appellants' principal argument in the trial court and before the Court of Appeals was that Saint Louis University was not a lawful recipient of the TIF funds because, according to Appellants, the University is controlled by the Catholic Church, and is controlled by a "religious creed, church or sectarian denomination." The undisputed evidence conclusively refutes this assertion.

The uncontroverted facts are that Saint Louis University is an independent Missouri benevolent corporation and is a nationally-recognized academic institution of higher education. (Affidavit of Lawrence Biondi, S.J. ("Biondi Affidavit"), Exhibits to Legal File, Volume II ("Ex. Vol. II"), at ¶ 2). Although the University has a tradition that aspires to Jesuit philosophies and ideals, it is not controlled by the Society of Jesus, the Catholic Church or any religious creed as prohibited by Missouri law. (Biondi Affidavit, Ex. Vol. II, at ¶ 3). Saint Louis University in no way requires that its employees or students aspire to Jesuit philosophies and ideals, be Catholic, or otherwise have any religious affiliation whatsoever. (Id.)

As established by Missouri corporate law, the University is controlled and operated by a corporate board of trustees. (Id.) That board of trustees is an independent, lay-majority board. Under the University's bylaws, its Board of Trustees shall consist of no fewer than twenty-five members and no more than fifty-five members. No fewer than six but no more than twelve of the members of the Board shall be members of the Society of Jesus. (Id.; Saint Louis University Bylaws ("Bylaws"), Exhibits to Legal File, Volume III ("Ex. Vol. III"), attached to Deposition of Lawrence Biondi, at Article II, ¶ 1). A majority of all trustees must be present at any meeting called to conduct any business on behalf of the University. A majority of all trustees present at such a meeting is necessary to authorize any corporate action (unless a greater vote is specified). (Biondi Affidavit, Ex. Vol. II, at ¶ 3; Bylaws, Ex. Vol. III, at Article II, § 2). At the time

of summary judgment, there were forty-two trustees, of whom only nine were Jesuits. [10] Of the 1,275 faculty/staff members at Saint Louis University, only 35 (less than three percent of the faculty and staff) were Jesuit. (Biondi Affidavit, Ex. Vol. II, at ¶ 3).

Appellants offered no evidence to refute that under Missouri law, a corporation in the State of Missouri is controlled by its board of directors/trustees. Nor did Appellants present any facts that would refute the University's demonstration that its Board of Trustees is indeed independent. Rather, Appellants have argued for the first time in their Substitute Appellate Brief that the statistical composition of Saint Louis University's Board of Trustees does not "establish the independence of the Board as an undisputed fact." Appellants attempt to support this claim by now alleging that "the mere fact that 33 members are non-Jesuit does not establish that they are non-Catholic or non-Catholic oriented." (Appellants' Substitute Brief at p. 36). This is apparently a purported disputed issue of fact that Appellants now imply for the first time should be further developed in the trial court, making summary judgment inappropriate.

[10] As a result of the University's Bylaws and the present configuration of its Board (forty-two trustees, of whom nine are Jesuit), it takes a minimum of twenty-two Board members to conduct the University's business. At this minimum number of twenty-two trustees, it would take at least twelve votes to approve a corporate act of the Board. Thus, the nine Jesuit trustees do not have the numerical authority to take any action on behalf of the University.

The short answer to this argument is that Appellants never raised it in the trial court. For example, they never asked the trial court to defer ruling on summary judgment to permit them to conduct additional discovery regarding this issue (as required by Missouri Rule of Civil Procedure 74.04(c)(2) and (f)). Appellants never contended that specific information about the religious beliefs of each trustee was relevant, let alone necessary in order to permit them to defeat summary judgment. In fact, contrary to their position now, Appellants stated in the trial court that "the number of Board of Trustees as Catholic or Jesuit is irrelevant…" (LF p. 209).

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. *Kemp Construction Co. v. Landmark Bancshares Corp.*, 784 S.W.2d 306, 308-309 (Mo.App.E.D. 1990); *Cain v. Hershewe*, 777 S.W.2d 298, 300-301 (Mo.App.S.D. 1989) ("If the plaintiff was not prepared to counter the affidavits and other proofs which the defendants proposed to offer, plaintiff could have asked for a continuance in the manner prescribed by paragraph (f) of Rule 74.04. The plaintiff made no request for a continuance, and he is in no position to complain in [the appellate court]."); *Landmark North County Bank & Trust Co. v. National Cable Training Centers, Inc.*, 738 S.W.2d 886, 892 (Mo.App.E.D. 1987).

The facts demonstrate that under Missouri corporate law, the board is not controlled by any outside entity. The evidence before the trial court undisputedly showed that only a nominal minority of the members of Saint Louis University's Board of Trustees are permitted to be members of the Society of Jesus. (Bylaws, Ex. Vol. III,

at Article II, § 1). Nowhere do the University's bylaws state that it is or even should be controlled by the Catholic Church or by any other religion. The Church's lack of control over Saint Louis University and its board are shown by the sale of its hospital to Tenet Healthcare in 1998. The sale was made directly against the strong and well publicized objection of the Catholic Archbishop of St. Louis. (Biondi Depo., Ex. Vol. V, at p. 24, ll. 1-11). This specific fact confirms the more general and undisputed factual statement made by President Biondi in his Affidavit that the University Board is in fact independent. Appellants offered no contradictory evidence in responding to summary judgment. That Saint Louis University is governed by an independent corporate board must thus be taken as established for summary judgment purposes.

That Saint Louis University is now and has for many years been managed by an independent corporate board is a critical factor under Article I, § 7 and Article IX, § 8. *See Americans United v. Rogers*, 538 S.W.2d 711, 721 (Mo. banc 1976). In *Americans United*, the state had established a financial assistance program for college students, with the funds to be used at public institutions or "approved private institutions." The private institutions were to be reviewed and approved by the state Coordinating Board for Higher Education. One of the statutory requirements for approval was that the institution be "under the control of an independent board." Some of the private colleges approved by the Coordinating Board had religious affiliations. 538 S.W.2d at 714-715.

The *Americans United* trial court had found the program at issue to be unconstitutional on its face as an impermissible use of state funds to advance religion under both the First Amendment to the United States Constitution and various Missouri

constitutional provisions, including those at issue here. This Court reversed, rejecting both the federal and state law arguments made by those challenging the program. In considering the challengers' argument made under Article IX, § 8 of the Missouri Constitution, the Court attached importance to the statutory requirement of independent boards:

> 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. *§ 173.205(2)(a) requires that an "approved" school must have an "independent board." Thus, those schools statutorily qualified would not be subjected to that "control" prohibited by Article IX, § 8 of the Missouri Constitution.*

538 S.W.2d at 721 (emphasis added). 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, § 8 if it is managed by an independent Board of Trustees, as is Saint Louis University.

To rebut the University's argument that the existence of an independent lay-majority board means that it is not subject to the control prohibited by Article IX, § 8, Appellants attempt to rely on a decision that predates *Americans United* by twenty-four years: *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. 1942). (Appellants' Substitute Brief at 29). *Harfst* was the first appellate opinion to address Article IX, § 8 after its adoption in the 1870's. 163 S.W.2d at 610. In *Harfst*, a public school board had attempted to do the

very thing Article IX, § 8 was intended to prevent: support a sectarian private school with public school funds. The public school board had taken St. Cecelia's parochial school in Meta, Missouri, into the public school system. It required Catholic students in the district to attend St. Cecelia's, continued to refer to St. Cecelia's as the "Catholic school," and allowed the school to be run in a manner identical to that of any Catholic parish grade school, while providing money from the public school fund for its support. The regimen at the school, as described by the *Harfst* court, is indistinguishable from that of the typical Catholic parochial school of the era: prayer and Mass to start the school day, instruction in Catholic catechism and the Catholic Bible from the habit-wearing Sisters of the Most Precious Blood, instruction from the parish priest, Friday confessions, grades in "Religion," holy water fonts at the doors of the school rooms, and pictures and symbols of the Catholic faith on the walls.

Not surprisingly, this Court rejected the argument that the nominal control of St. Cecelia's by the public school board saved this arrangement from illegality. "[W]e 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 at 613.

The present case is simply not *Harfst.* Saint Louis University is nothing like the Catholic grade school in that case. The University has not sought to accomplish by indirect means that which the Missouri Constitution forbids. Rather, the University is the model of exactly what this Court approved as permissible in *Americans United* under the Missouri Constitution. Saint Louis University is not controlled by any religion or religious creed; rather, it is fully controlled by an independent corporate board. It does

not discriminate in either hiring or admissions based on religion (or any other classification impermissible under state or federal law). It does not require its students or faculty members to attend confessions or masses. It does not require Catholic catechism. Rather, it operates in and supports a spirit of academic freedom and open inquiry -- even in instances when such freedom and inquiry runs contrary to the teachings of the Catholic religion.

Although recognizing that the Missouri Constitution "does not distinguish between various educational levels and thereby prohibits adoption of a different standard for schools of higher education from that applied to elementary-secondary schools," the *Americans United* Court nonetheless distinguished *Harfst* and a series of later decisions in which the use of state funds in aid of parochial grade schools or their students had been found unlawful because of the factually inherently different nature of the institutions involved:[11]

[11] There were a number of such decisions in the post-World War II era, including *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953) (public school funds may not be used to transport parochial school children by bus); *Berghorn v. Reorganized School Dist. No. 8*, 260 S.W.2d 573 (Mo. 1953) (a decision similar to *Harfst* where public funds were used to support a school located on church property and operated by religious sisters and the arrangement was found unlawful); *McDonough v. Aylward*, 500 S.W.2d 721 (Mo. 1973) (no constitutional provision requires exemption of parent of student at private religious school from payment of taxes for public education); *Paster v. Tussey*, 512 S.W.2d 97

> [W]e take solace in the fact that the parochial school cases with which this court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved. As suggested by the proponents: "Institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students, and a diversity of religious background in faculty and students."

Americans United, 538 S.W. 2d at 722.

Contrary to Appellants' argument, Saint Louis University does not contend that it is a permissible recipient of state funds simply because it is a university rather than a grade school. By its express terms, Article IX, § 8 applies to universities as well as grade

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(Mo. banc 1974) (statutes requiring use of public school textbook funds to provide books for private school pupils and teachers violate Missouri Constitution). Appellants devote a point relied on (their point III) to the argument that certain of these cases (*Harfst*, *Berghorn* and *Paster*) are controlling, and that the trial court here committed error by ignoring them. In fact, as the *Americans United* opinion shows, they are of limited utility here because of their vastly different factual settings. Moreover, a trial court that reaches the correct result does not commit error simply by failing to discuss every case cited by the losing party, particularly where (as here) that party has advanced a large number of cases in support of a wide variety of arguments, many of which are simply not applicable to the issues on appeal. *See* fn. 5, *supra*.

schools and secondary schools, as the *Americans United* court acknowledged. 538 S.W. 2d at 720. Rather, unlike the St. Cecilia school in *Harfst*, Saint Louis University is a permissible recipient of state funds because of the established absence of control over it by any religious creed, church or denomination.

Appellants also seek to distinguish *Americans United* on the basis that in that case the benefit flowed to the individual students rather than directly to the religious institutions involved. (Appellants' Substitute Brief at 41-42). The distinction between benefits that flow to students (and so are lawful) and those that flow to religious institutions (and so can be unlawful) has been recognized in federal Establishment Clause cases, such as *Board of Education v. Allen*, 392 U.S. 236, 244 (1968).

Whether that same distinction applies in interpreting the Missouri constitutional provisions at issue here is less clear. *See Paster v. Tussey*, 512 S.W.2d 97, 104 (Mo. 1974) (questioning whether the court was at liberty to adopt the *Allen* "pupil-benefit" theory in interpreting the Missouri Constitution). Nowhere in its *Americans United* opinion did this Court state that it was resolving the validity of the "pupil-benefit" argument, an issue it had left open in *Paster* two years before. While it described the arguments of the *Americans United* appellants that the pupil-benefit theory should apply, 539 S.W.2d at 721, the Court rested its decision on the state law questions on a different basis. It held that religiously affiliated schools controlled by independent boards "would

not be subjected to that 'control' prohibited by Article IX, § 8 of the Missouri Constitution." Id. It is that holding which governs here.[12]

Appellants also attempt to distinguish *Americans United* on the basis that the statute in that case required that the institutions permit faculty members to choose textbooks without sectarian influence. (Appellants' Substitute Brief at 44). There is no evidence whatsoever that Saint Louis University exercises "sectarian influence" over textbook selection. It would not be realistic to expect that a TIF ordinance aimed at blighted land redevelopment would be so specific as to impose the type of restriction contained in the education statute at issue in *Americans United*.

Finally, in a further attempt to distinguish *Americans United*, Appellants make much of the fact that the statutory scheme found constitutional in that case required that recipients of public funds thereunder be approved by accrediting groups whose purpose was to ensure the absence of religious control by such recipients. However, this does not change the unequivocal statement of the *Americans United* court that "[Section] 173.205(2)(a) requires that an 'approved' school must have an 'independent board.'

[12] The conclusion of a federal district court in *Felter v. Cape Girardeau School Dist.*, 810 F.Supp. 1062, 1069 (E.D.Mo. 1993) (cited in Appellants' Substitute Brief at 42-43) that the pupil-benefit argument was "part of" the reasoning of the *Americans United* Court does not bind this Court, nor does it change the fact that the existence of independent boards was also "a part," and, in fact, an essential part, of the reasoning of the *Americans United* Court.

Thus, those schools statutorily qualified would not be subjected to that 'control' prohibited by Article IX, § 8, of the Missouri Constitution." 538 S.W.2d at 721.

That Saint Louis University's bylaws formerly required that its President (who fulfills his duties subject to the control of the lay-majority, corporate Board) be a member of the Society of Jesus makes no difference. The language of Article IX, § 8 does not disqualify a university in such a circumstance. The question is not whether the head of the institution is a member of a religious order, but whether the institution itself is subject to control by a creed, church or sectarian denomination.

The courts of New York (significant because of it being the site of one of the first state "Blaine Amendments") have addressed the issue under Article XI, § 3 of that state's highly-similar constitutional provision. Article XI, § 3 of the New York Constitution prohibits the use of public monies in aid "of any school or institution of learning wholly or in part under the control or direction or any religious denomination." In *College of New Rochelle v. Nyquist*, 326 N.Y.S.2d 765, 771-772 (A.D. 1971), the Appellate Division was required to determine whether the College of New Rochelle was "controlled or directed by a religious denomination" and whether state aid to the college was therefore prohibited under Article XI, § 3. In considering the issue, the Court identified the following facts related to the College of New Rochelle:

> The College of New Rochelle was founded in 1904 by the Ursuline Nuns, an order devoted to the education of girls. It describes itself as "a liberal arts college for women under Catholic auspices" "committed to the Christian tradition in its uniqueness and complexity" and believing that "the

> Christian faith is relevant to learning and life." The responsibility for administering the college is shared by the Community of Ursuline Nuns, who also comprise a substantial minority of the board of trustees, occupy the presidency and comprise approximately one third of the faculty. The Ursuline Nuns…are, of course, governed in matters of faith by their religion. This is to be expected and, as noted, will not, in and of itself, bring the college within the proscription.

Id. at 771.

The Court stated:

> Mere affiliation or a sharing of administrative control by a denomination will not, in and of itself, bring the institution within the proscription of the statute; such a situation cannot be said to have caused religion to so 'pervade' the atmosphere of the college as to effectuate religious control or direction by a religious denomination…The question is whether the college was controlled or directed by a religious denomination so as to inculcate or attempt to inculcate the doctrine and faith of the denomination. We find upon an analysis of the record, considering the totality of the circumstances, that this is not the case…"

Id. at 771-772.

This Court should reach the same result. As previously shown, Saint Louis University is not controlled by the Jesuits, the Catholic Church or any religious creed. (Biondi Affidavit, Ex. Vol. II, at ¶ 3). Rather, under Missouri law, the University is

controlled and operated by an independent, corporate lay-majority board. Id. Saint Louis University is not controlled by any creed, church or sectarian denomination, and is an appropriate recipient of state funds.

Control by a Religious Creed

Appellants have changed their focus on appeal from the positions they took in the trial court. Their argument has shifted away from their original allegation that control of Saint Louis University is vested in outside institutions such as the Catholic Church. Having failed on that front, Appellants now assert that the fact that Saint Louis University's admitted lay-majority corporate Board is independent as required by *Americans United* is "mainly irrelevant" because what matters – they argue – is that the Board "is committed under the By-Laws to run the university and educate the students in the Jesuit spiritual tradition." (Appellants' Substitute Brief at 29). They now contend that Saint Louis University's acknowledged adherence to its Catholic, Jesuit history and tradition shows that it is controlled by a "creed," that its President and the Jesuits are "doing all they can to instill in the students the Jesuit and Catholic doctrine and values," (Appellants' Substitute Brief at 30), and that the University is therefore disqualified from the receipt of public funds. Appellants' new propositions lack factual support and are contrary to the undisputed facts showing a lack of religious indoctrination at Saint Louis University. A party may not resist summary judgment by conjecture.

The Constitution does not define "creed," a word that can have two distinct meanings. It can mean "a religion or religious sect." *Webster's Third New International Dictionary* 533 (2002). As shown above, Saint Louis University is not controlled by the

Catholic Church or any other religion or religious sect, so that if the drafters used the word "creed" in the sense of a religion or sect, Article IX, § 8 does not apply to Saint Louis University. It is not controlled by a religion or sect.

"Creed" can also mean "a formulation or system of religious faith" (Id.) It is apparently in this sense that Appellants use the term when they accuse Saint Louis University of being controlled by a "creed." Appellants cannot mean to assert that any institution with a religious affiliation is necessarily controlled by a "creed" and so subject to the control prohibited by Article IX, § 8. *Americans United* holds otherwise. *Americans United* permits institutions with church affiliations to participate in the state funds program at issue in that case. Rather, Appellants wrongfully assert that this particular university is controlled by a "creed" in some formal sense, in order that it be disqualified from receiving similar state funds.

Addressing this argument requires a consideration of all of the evidence that the parties chose to place in the summary judgment record related to Saint Louis University's purposes, beliefs, and governing philosophy. The bylaws set forth the University's primary corporate purposes:

> 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.

(Bylaws, Ex. Vol. III, at Article I, ¶ 2) (emphasis added).

By adopting as its primary corporate purposes the encouragement of learning and extension of the means of education, by dedicating itself "to the service of its immediate community," and by committing itself to achieve these ends through means "appropriate to a university in our society, including teaching, research and the discovery, presentation and communication of knowledge," the University has made clear that it is not controlled in carrying out its mission by a "creed" in the sense of a formalized system of religious beliefs. Rather, the University has chosen to be a "university" as that term is used in twenty-first century America, marked by the academic freedom and independence of thought that are essential characteristics of universities in modern American life. *See Americans United*, 538 S.W.2d at 722; *Tilton v. Richardson***,** 403 U.S. 672, 681-82 (1971); *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976).

In their quest to create a disputed issue of material fact on this issue, Appellants point to other portions of the bylaws, which provide:

> 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*** [emphasis added] as a Catholic university and as a Jesuit university.
>
> b. The University will be ***motivated*** [emphasis added] by the moral, spiritual and religious inspiration and values of the Judaeo-Christian tradition.
>
> c. The University will be ***guided*** [emphasis added] by the spiritual and intellectual ideals of the Society of Jesus.

(Bylaws, Ex. Vol. III, at Article I, ¶ 3).

That an institution hopes to be "identified," "motivated" and "guided" by certain religious ideals in no way means or even implies that the institution is "controlled by" a religious creed.

President Biondi testified about what these provisions mean to the philosophy of Saint Louis University:

> [O]ur philosophy is basically 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, to take the kind of things that they have learned in whether it be history or philosophy or geography and so on or medicine or law and to take those principles of -- education and to live

them out in their society to make changes in their workplace and to improve the society in which they are -- in which they live.

(Biondi Depo., Ex. Vol. V, at p. 12, ll. 12-21).

President Biondi emphasized that "[H]ere at St. Louis University, our students are not only supposed to get a degree, they're supposed to try to reach out to their community." (Id. at p. 12, ll. 22-24). He then described the community service and volunteer programs at Saint Louis University. He concluded, "So it's not only trying to give our students in a Jesuit tradition an education, but to change their characters into what we call men and women for others." (Id. at p. 13, ll. 8-10).

This is a philosophy of education and a system of character formation. It is not a "religious creed" in the sense of an organized system of controlled religious beliefs.

As evidence that Saint Louis University is controlled by a "creed," Appellants point to the Mission Statement of Saint Louis University, which expresses in a variety of ways that its pursuit of truth, understanding and the transformation of society are undertaken "for the greater glory of God" and "in the spirit of the Gospels." (Appellant's Brief at 40). These general declarations of a religious ideal do not disqualify from the receipt of state funds any institution that had at any time made similar statements of belief.

One needs to look no further than the Missouri Constitution itself to recognize that a religious ideal is not forbidden. The preamble to the 1875 Constitution recites that the people establish the Constitution with "profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness." The same language is used in the preamble to

the present Constitution. *See Oliver v. State Tax Commission*, *supra* (reference to God on state tax declaration form does not violate Article IX, § 8). Neither the University's bylaws' expressions of religious ideals nor the general statements of religious ideals contained in the University's mission statement constitute a "creed" in the sense of an organized system of religious beliefs.

Many of the institutions identified as Catholic in the nineteenth century, including Saint Louis University, have undergone changes over time. They have adapted themselves, their corporate structures and their missions to serve a largely secular world. As shown by its governance structure, its bylaws taken as a whole, and President Biondi's Affidavit and deposition testimony, Saint Louis University can properly be identified as "Catholic" without being under the control of a "religious creed" as used in Article IX, Section 8. The concurring judge in the Court of Appeals expressed skepticism that Saint Louis University is "no longer controlled by the Catholic creed," but that is exactly what the record that the parties presented to the trial court established. Saint Louis University, while identified as "Catholic," is not controlled by a "religious creed" and so is not disqualified from the receipt of public funds under Article I, § 7 and Article IX, § 8.

Menorah Medical Center

This Court's judgment in *Menorah Medical Center v. Health and Educational Facilities Authority*, 584 S.W.2d 73, 86-87 (Mo. banc 1979), a prior case specifically involving Saint Louis University, supports the University's position. This Court's judgment in the *Menorah* case allowed Saint Louis University to receive funds from a

public authority that issued tax exempt bonds. This is similar to the University's receipt of public Tax Increment Financing in the present case. The plurality opinion in *Menorah Medical Cente*r found that such an arrangement did not involve "excessive entanglement" of the state with religion, notwithstanding Saint Louis University's history and the fact that two-thirds of the University's board members were of the Catholic faith at that time. 584 S.W.2d at 87.

Appellants contend that the trial court erred in relying on the *Menorah* plurality opinion, arguing that statements in a plurality opinion are not binding precedent. In fact *Menorah Medical Center* has been cited by Missouri courts for various propositions of law in more than ten reported opinions since the time it was decided. *See, e.g., Fust v. Attorney General*, 947 S.W.2d 424, 429 (Mo. banc 1997); *Century 21-Mabel O. Pettus, Inc. v. Jennings*, 700 S.W.2d 809, 810 (Mo. banc 1985); *Evangelical Retirement Homes of Greater St. Louis, Inc. v. State Tax Commission*, 669 S.W.2d 548, 554 (Mo. banc 1984); *State ex rel. Public Defender Commission v. County Court of Greene County*, 667 S.W.2d 409, 412 (Mo. banc 1984); *State ex rel. Leet v. Leet*, 624 S.W.2d 21, 22 (Mo. 1981); *State ex rel. Wagner v. St. Louis County Port Authority*, 604 S.W.2d 592, 597 (Mo. banc 1980); *Blue Cross and Blue Shield of Kansas City, Inc. v. Nixon*, 26 S.W.3d 218, 228 (Mo.App.W.D. 2000); *Bergman v. Mills*, 988 S.W.2d 84, 89 (Mo.App.W.D. 1999); *City of Smithville v. St. Luke's Northland Hospital Corp.*, 972 S.W.2d 416, 421 (Mo.App.W.D. 1998); *Metropolitan Tickets, Inc. v. City of St. Louis*, 849 S.W.2d 52, 55 (Mo.App.E.D. 1993); *Brawley v. McNary*, No. 54668, 1990 Mo.App. LEXIS 1345, *18 (Mo.App.E.D. Sept. 4, 1990).

Except as to result, Missouri courts have routinely recognized that an opinion of this Court en banc (like *Menorah Medical Center*) which lacks concurrence of a majority of judges has guidance value but is not controlling. *See, e.g., State v. Bradshaw*, 593 S.W.2d 562, 565 (Mo.App.W.D. 1979); *Brown v. H & D Duenne Farms, Inc.*, 799 S.W.2d 621, 628 (Mo.App.S.D. 1990). Moreover, even in situations in which a plurality opinion is rendered and in which additional judges concur in result only, the decision is binding authority with respect to the result. *Nolte v. Wittmaier*, 977 S.W.2d 52, 59 (Mo.App.E.D. 1998). It is the result that is telling in *Menorah Medical Center*. This Court determined that the statutory scheme involved in *Menorah* did not violate the Missouri Constitution. The same holds true in the present matter.

Alleged Application of Federal Standards to State Constitution

Appellants devote a portion of one point relied on (Point Relied On II) to the contention that the trial court erroneously applied federal Establishment Clause standards to interpretation of the state constitutional provisions at issue. (Appellants' Substitute Brief at 38-48). In fact, Missouri appellate courts have from time to time looked to the federal standards in interpreting the Missouri Constitution. *Menorah Medical Center v. Health and Educational Facilities Authority*, 584 S.W.2d 73 (Mo. banc 1979) . The trial court reached the correct result under the Missouri Constitution. Even if this portion of its reasoning was subject to question, its result should still be affirmed. *Jennings v. City of Kansas City*, 812 S.W.2d 724, 728 (Mo.App.W.D. 1991).

Interaction of the First Amendment and the State Constitutional Provisions

In addressing Appellants' state constitutional claims, it is necessary to consider the interaction between the Missouri constitutional provisions at issue and the First Amendment to the federal constitution. The TIF financing passes muster under the First Amendment's Establishment Clause, as shown in Part II below. Appellants argue, however, that the states are free to adopt their own laws prohibiting public funding that benefits religious institutions in circumstances where the federal Establishment Clause would permit such funding. (Appellants' Substitute Brief at 47). They point to a number of statements in Missouri decisions, from *Harfst* through *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. banc 1997) to the effect that the Missouri constitutional provisions on separation of church and state "are not only more explicit but more restrictive" than the First Amendment's Establishment Clause. (Appellants' Substitute Brief at 47-48).

The oft-repeated general proposition that the Missouri constitutional provisions are more restrictive than the federal Establishment Clause is irrelevant to this case. What matters on Appellants' first four points on appeal is the proper interpretation of the language in the Missouri constitutional provisions. Whether that language is "more restrictive" in a general sense than the federal Establishment Clause affords little assistance to the Court. Even as this Court has interpreted Missouri's more restrictive constitutional provisions, it is lawful for a university under these circumstances to share in generally available state funds used for a public purpose.

The First Amendment is relevant to the state constitutional analysis here for a different reason. The Supreme Court of the United States has recognized that a state's

interest in maintaining a greater separation between church and state than is required by the First Amendment's Establishment Clause can run afoul of the free speech and free exercise clauses of the same amendment. *Widmar v. Vincent*, 454 U.S. 263 (1981) (Missouri's interest in maintaining separation of church and state is overridden by the free speech and free exercise clauses, so that a state university cannot refuse access to public facilities sought by student groups desiring to conduct religious services and discussions if the university makes the facilities available to other student organizations).

There is some "play in the joints" between the free exercise and establishment clauses. *Locke v. Davey*, 540 U.S. 712, 718 (2004). As *Locke* holds, a state may, without violating the free exercise clause, exclude from a generally available scholarship program a student who wishes to use the scholarship funds to study for the ministry. This result is based on the historic tradition in the United States of opposition to a state-supported clergy. It is far from clear, however, that a state may constitutionally deprive a private educational institution of funds made generally available for a public purpose, simply because that private institution was founded nearly 200 years ago by a religious order and is today affiliated with general principles of a religious faith.

The City of St. Louis has determined that redevelopment of midtown St. Louis is necessary to the common public good, and has approved TIF financing for a number of projects in the area, all of them secular in purpose. (LF p. 250, ¶ 8). It has also determined that it would be appropriate to include one university-owned project, a sports arena with no religious purpose, in the redevelopment project. Id. If Missouri by its Constitution were to dictate to Saint Louis University that because of a religious

orientation it could not receive funds that the City wished to make available to it for the public purpose of redeveloping an urban blighted area, serious free exercise issues would arise under both the federal and state constitutions.

Adopting Appellants' proposed construction of the constitutional provisions at issue would thus give rise to complex constitutional issues. The argument has been made that applying state Blaine amendments to deny aid even to "pervasively sectarian" schools collides with federal constitutional principles that prohibit "governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (Thomas, J., plurality opinion). If this Court were to construe the term "controlled by a religious creed" so broadly as to sweep in any university that characterizes itself as "Catholic" (or as adhering to any particular religious faith) and to deny otherwise available public benefits to such institutions, the Court would have to face the difficult free exercise and equal protection issues that such a construction would present. As in federal courts, a Missouri court will avoid the decision of a constitutional question if the case can be fully determined without reaching it. *See State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341, 346-48 (1936). This Court should not expand the meaning of the words used in the Missouri Constitution beyond their ordinary meaning, particularly when doing so would give rise to thorny conflict issues between the state and federal constitutions.

Procedural Safeguards

In its *amicus curiae* brief, Americans United for Separation of Church and State ("Americans United") argues that the TIF Ordinances violate both the federal Establishment Clause and the Missouri Constitution because the ordinances do not specifically prohibit the Arena from being used for religious purposes and provide no means for policing use of the TIF funds to ensure that they are not used for religious purposes. This argument fails for a number of reasons.

First, the argument advanced by Americans United in its *amicus curiae* brief was not advanced by any of the parties to this lawsuit and was therefore never considered by the trial court or the Court of Appeals. An *amicus curiae* cannot inject new issues into a case which were not previously presented by the pleadings and/or the parties, and this Court should thus refuse to consider those arguments made for the first time by Americans United in its brief. *See, e.g., Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 882 (Mo. 1999); *Robert Williams & Co., Inc. v. State Tax Commission of Missouri,* 498 S.W.2d 527, 530 (Mo. 1973); *Gem Stores, Inc. v. O'Brien*, 374 S.W.2d 109, 118 (Mo. banc 1963).

Second, the *amicus curiae* brief filed by Americans United is replete with alleged "facts" which are not part of the record before this Court and which were not part of the record before either the trial court or the court of appeals and which should not therefore be considered by this Court. *See Pretti v. Herre*, 403 S.W.2d 568, 569 (Mo. 1966) ("[The Supreme Court] must take the record as it comes to us and it cannot be supplemented by extraneous matter…"; *J.B. Allen, Inc. v. Pearson*, 31 S.W.3d 526, 529 (Mo.App.E.D.

2000) ("[W]e will not consider matters not contained in the record"); *Marc's Restaurant, Inc. v. CBS, Inc.*, 730 S.W.2d 582, 584 (Mo.App.E.D. 1987) ("Documents or other exhibits never presented to or considered by the trial court may not be introduced into the record on appeal").

Third, even if this Court does consider the argument advanced by Americans United, the argument is factually flawed. Americans United argues that the TIF Ordinances violate both the federal and Missouri constitutions because the ordinances do not specifically prohibit the Arena from being used for religious purposes and provide no means for policing use of the TIF funds to ensure that they are not used for religious purposes. However, quite to the contrary, the TIF Ordinances specifically limit the use of TIF funds to entirely secular purposes, including the development of theaters, museums, parking, green space, educational and housing projects, retail and mixed-use establishments, historic rehabilitation and arena projects. (Ordinance 65703, Ex. Vol. I, at § A, p. 2). The funds specifically allocated to Saint Louis University under the TIF Ordinances must be used exclusively to build an arena which would host a variety of secular functions "including plays, concerts, cultural events, community events, speakers, trade shows, academic conferences, commencements and sporting events," not masses and other religious functions. (Ordinance 65703, Ex. Vol. I, at § A, pp. 59-60).

Americans United argues that both the federal Establishment Clause and certain provisions of the Missouri constitution "restrict the use of governmental aid to secular purposes and thereby require the imposition of safeguards to ensure the aid is not diverted to religious uses" and that the TIF Ordinances run afoul of this constitutional requirement

because they do not contain any procedural safeguards to prevent the funds from being diverted to sectarian uses. (*Amicus Curiae* Brief filed by Americans United at 12-14). However, the U.S. Supreme Court has held that the federal Establishment Clause does not establish an absolute prohibition against public aid to religious schools merely because such aid is "reasonably divertible to religious uses." *Mitchell v. Helms*, 530 U.S. at 853 (O'Connor, J., concurring).[13] Rather, only actual diversion of public funds toward religious indoctrination by a religious institution is constitutionally impermissible. Id. at 857-858. Here, Appellants have produced no evidence that any of the funds provided to Saint Louis University under the TIF Ordinances have been diverted toward religious indoctrination, nor could they ever.

Moreover, while Justice O'Connor recognized that procedural safeguards are helpful in uncovering potential diversion of public funds toward religious indoctrination, she refused to elevate the need for procedural safeguards to the level of a constitutional requirement. Id. at 867. In fact, she specifically stated that pervasive monitoring of public funding to religious institutions is not constitutionally necessary. Id. at 861. Here, any financial assistance provided to Saint Louis University under the TIF Ordinances must be used exclusively to construct the Arena, and any use of the Arena for religious indoctrination may be easily discovered and corrected, thereby eliminating the need for

[13] Americans United has recognized that Justice O'Connor's concurring opinion in *Mitchell v. Helms* is controlling, as it sets forth the narrowest grounds for deciding the case. (*Amicus Curiae* Brief filed by Americans United at 22).

pervasive procedural safeguards to prevent the Arena from being used for religious purposes.

In addition, as previously stated, imposing restrictions upon Saint Louis University's receipt of TIF funding because of its religious heritage raises substantial free exercise and equal protection issues, which this Court should avoid if the case can be fully determined without deciding such thorny constitutional issues. *See State ex rel. Union Elec. Co.*, 687 S.W.2d at 165; *Ashwander*, 297 U.S. at 341, 346-48.

Appellants' Purported Fact Issues

In their fourth Point Relied On, Appellants now contend that there are disputed issues of material fact and, accordingly, the trial court should not have granted summary judgment to the City and Saint Louis University. (Appellants' Substitute Brief at 50-55). This argument was not made to the trial court, and no request for additional discovery was made in opposition to the motion for summary judgment.

It is unclear from their argument, however, what issues they would have a trier of fact decide. Appellants challenge President Biondi's description of the independence of the Board of Trustees, and his assertion that Saint Louis University is not controlled by a religious sect or creed. (Appellants' Substitute Brief at 51-52). They then set out twelve numbered paragraphs, substantially consisting of undisputed and largely irrelevant facts. Those facts show that Saint Louis University is a Catholic university within the Judeo-Christian tradition; that it operates according to its bylaws; that a purpose of building an arena with the TIF funds would be to make the campus more attractive to students; that the bylaws required the President to be a Jesuit and vest in him the active management of

Saint Louis University; that there are religious principles in Saint Louis University's mission statement; that there are banners in the area of Saint Louis University that read, "In the Lord's Service;" that the motto of the Jesuits is religious; that Jesuits have as a purpose saving souls; that Jesuits are dedicated to human dignity and believe that God can be found in all things; and that laymen cannot change the basic tenets of the Jesuits.

None of these statements of fact are disputed. The only disputes involved in this case relate to the conclusions to be drawn from these undisputed facts. None of these statements of fact establish that Saint Louis University is controlled by a "religious creed." On the other hand, the undisputed facts do establish that Saint Louis University is controlled and operated by an independent, corporate lay-majority board, not by the Society of Jesus, the Catholic Church or any religious creed. (Biondi Affidavit, Ex. Vol. II, at ¶ 3). Moreover, Saint Louis University in no way requires that its employees or students be Catholic or otherwise have any religious affiliation whatsoever. Id. These undisputed facts all establish beyond doubt that Saint Louis University is not controlled by any religious creed, church or sectarian denomination.

Appellants, the American Civil Liberties Union (the "ACLU") (*Amicus Curiae* acting on behalf of Appellants)[14] and the concurring judge in the Court of Appeals take

[14] Much like the *amicus curiae* brief filed by Americans United, the *amicus curiae* brief filed by the ACLU contains significant alleged "facts" that are not part of the record before this Court and that were never part of the record before either the trial court or the court of appeals and that should not therefore be considered by this Court. *See Pretti*,

umbrage with the "remarkably thin summary-judgment record" involved in this case. (Appellants' Substitute Brief at 35). However, when a summary judgment movant has established material facts that are not in genuine dispute and entitle it to judgment as a matter of law, the non-movant bears the burden of creating a genuine dispute by supplementing the record with competent materials that establish a plausible, but contradictory, version of the movant's essential facts. *ITT Commercial Finance Corp.*, 854 S.W.2d at 382. Pursuant to Missouri Rule of Civil Procedure 74.04, if a party opposing a motion for summary judgment has not had sufficient time to conduct discovery on the issues to be decided in the motion, such party is required to file an affidavit describing the additional discovery needed in order to respond to the motion and the efforts previously made to obtain such discovery; the court may then continue the motion for summary judgment for a reasonable time to allow the party to complete the requested discovery. Mo.R.Civ.P. 74.04(c)(2) and (f). A party cannot complain on appeal that a trial court erred in failing to order a continuance to permit additional discovery when the party never requested such a continuance before the trial court. *Kemp Construction Co.*, 784 S.W.2d at 308-309; *Cain*, 777 S.W.2d at 300-301; *Landmark North County Bank & Trust Co.*, 738 S.W.2d at 892.

Here, the University submitted its motion for summary judgment establishing that it was entitled to judgment as a matter of law and that all material facts necessary for the

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403 S.W.2d at 569; *J.B. Allen, Inc.*, 31 S.W.3d at 529; *Marc's Restaurant, Inc.*, 730 S.W.2d at 584.

trial court to reach such a decision were not in genuine dispute. Appellants failed to supplement the record with sufficient materials to create a genuine dispute regarding the material facts identified by the University. More importantly, Appellants never requested that the trial court continue the motion for summary judgment to permit them to conduct additional discovery regarding this issue (as required by Missouri Rule of Civil Procedure 74.04(c)(2) and (f)), nor did Appellants ever indicate that such information was necessary in order to permit them to defeat summary judgment.

Rather than request a continuance of the motion for summary judgment to permit them to attempt to perform additional discovery, Appellants filed their own motion for judgment on the pleadings. (LF pp. 188-197). A motion for judgment on the pleadings is only sustainable where the moving party is entitled to judgment as a matter of law as indicated from the face of the pleadings. *Angelo v. City of Hazelwood*, 810 S.W.2d 706, 707 (Mo.App.E.D. 1991). Appellants apparently believed that no additional discovery was necessary; they contended that they were entitled to judgment as a matter of law on the face of the pleadings alone. They argued before the trial court that "SLU's operation [fell] squarely within the prohibition of the MO Const. Art. IX Sec. 8" because "under SLU's own By-laws[15]…this 'independent lay board' has the duty to operate the university according to the Jesuit creed and doctrine" (LF p. 199) and that "[t]he number

[15] Saint Louis University's Bylaws were submitted to and considered by the trial court in this case. (Saint Louis University Bylaws ("Bylaws"), Exhibits to Legal File, Volume III ("Ex. Vol. III"), attached to Deposition of Lawrence Biondi).

of university employees and the number of Board of Trustees as Catholic or Jesuit is irrelevant since [SLU] is an admitted religiously affiliated university which is controlled under Catholic and Jesuit doctrine." (LF p. 209).

By placing all of their eggs in a single basket and by adhering strictly to their belief that they were entitled to judgment as a matter of law on the face of the pleadings alone, Appellants voluntarily and strategically chose not to request a continuance of the motion for summary judgment to permit them to attempt to more fully develop the factual record in this case. It is not the role of the court to become an advocate for a party by establishing the factual record. Because Appellants failed to attempt to timely develop the record or request a continuance to permit them to conduct further discovery in this case, they cannot now complain of the "remarkably thin summary-judgment record" for which they are responsible. *Kemp Construction Co.*, 784 S.W.2d at 308-309; *Cain*, 777 S.W.2d at 300-301; *Landmark North County Bank & Trust Co.*, 738 S.W.2d at 892.

The trial court considered the evidence before it and correctly found that Saint Louis University's receipt of TIF funds does not violate the Missouri Constitution. Its judgment should be affirmed.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT REGARDING THE FEDERAL ESTABLISHMENT CLAUSE BECAUSE THE RECORD AMPLY SUPPORTS A FINDING THAT THERE WAS NO EXCESSIVE ENTANGLEMENT BETWEEN THE STATE AND CHURCH AFFAIRS AND THERE WAS NO EVIDENCE RELIGION IS SO PERVASIVE AT SAINT LOUIS UNIVERSITY THAT A SUBSTANTIAL PORTION OF ITS FUNCTIONS ARE SUBSUMED IN THE RELIGIOUS MISSION. [ADDRESSING APPELLANTS' POINTS V AND VI].

Standard of Review

This section of Respondent's argument is governed by the same de novo standard of review, subject to the presumption of constitutionality of the ordinances at issue, that applies to Section I.

The Establishment Clause

Appellants make two arguments under the Establishment Clause of the First Amendment. Both are without merit.

In Section V of their Brief, Appellants argue that the trial court erred in granting summary judgment that the TIF Ordinances do not violate the federal Establishment Clause because, they assert, the record supports a finding that the TIF Ordinances have a "tendency to entangle the state excessively in church affairs." The "excessive entanglement" factor is the third of the three prongs of the test for legality under the

Establishment Clause as established by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S. at 612-613. In *Americans United*, this Court recognized that the *Lemon* factors govern federal Establishment Clause challenges.[16]

By omission, Appellants concede the first two prongs of the *Lemon* test. In support of their argument that the TIF Ordinances are unconstitutional under the third prong of the *Lemon* test, Appellants assert that they "pleaded facts to the effect of excessive government entanglement with a religious institution" and that, since "[n]either Father Biondi's affidavit nor any other proper evidence submitted by [Saint Louis University] controverted the above statement," "[i]t stands admitted for the purposes of this Summary Judgment." (See Appellants' Substitute Brief at 56).

[16] In United States Supreme Court decisions decided after *Lemon* and *Americans United*, the "excessive entanglement" factor appears to have been merged with the "primary effect" factor in school aid cases. *Mitchell v. Helms*, 530 U.S. 793, 807-808 (2000) (plurality opinion); *Agostini v. Felton*, 521 U.S. 203, 232-233 (1997).

Appellants' argument in this regard fails for two reasons. First, Appellants' statement is in error. It ignores the fact that Saint Louis University properly denied the statement relied upon by Appellants in its Answer to Appellants' Counterclaim. (LF p. 91, ¶ 8). Second, a trial court's award of summary judgment will be upheld when it is "clear to [the] court and readily ascertainable from the record the facts on which the respondents were relying to negate the appellants' affirmative defense." *Rodgers v. Threlkeld*, 22 S.W.3d 706, 711 (Mo.App.W.D. 1999). The record is replete with facts which support a finding that there was no excessive governmental entanglement with a religious institution in this case.

In order to determine whether the TIF Ordinances constitute an "excessive entanglement" between church and state under the First Amendment to the U.S. Constitution, this Court need look no further than this Court's en banc opinion in *Menorah Medical Center*, where the Court addressed this precise 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 four observations made by the plurality of this Court in *Menorah Medical Center* are equally applicable in this case. The TIF notes created under the TIF Ordinances which will provide the primary source of funding to those engaged in redevelopment projects are *not* debts of the City of St. Louis. (St. Louis City Ordinance 65858, Ex. Vol. I, at § C, pp. 10-11). Further, the funds are required to be used for the purely secular and neutral purpose of redeveloping the blighted redevelopment area, including the construction of certain physical facilities, namely, a 10,600-seat arena to be used for sporting events and graduation ceremonies. Finally, it is undisputed that Saint Louis University is an institution of higher education, not an elementary or secondary school.

The U.S. Supreme Court has routinely held that public aid to church-affiliated colleges and universities does not violate the Establishment Clause. Daniel A. Klein, J.D., *Establishment and free exercise of religion clauses of Federal Constitution's First Amendment as applied to public aid to sectarian schools or students at such schools -- Supreme Court cases*, 153 L.Ed.2d 991, § 2(a) (2004). The courts of this country have long recognized that the provision of federal or state aid does not excessively entangle the state in church affairs and does not violate the Establishment Clause of the First Amendment to the U.S. Constitution simply because a religiously-affiliated entity is involved.[17]

[17] *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upheld use of federal funds for construction at religious hospital); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370

(1930) (upheld state law providing secular textbooks to all students, including religious school students); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (upheld law providing reimbursement to parents for cost of transporting children to religious schools); *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (upheld state law requiring secular textbooks be provided to private and public schools.); *Tilton v. Richardson*, 403 U.S. 672 (1971) (upheld construction grants for secular buildings at religious colleges and universities); *Hunt v. McNair*, 413 U.S. 734 (1973) (upheld issuance of revenue bonds for religious colleges); *Wheeler v. Barrera*, 417 U.S. 402 (1974), opinion modified 422 U.S. 1004 (1975) (religious school students are entitled by federal statute to services comparable to those offered in public schools); *Meek v. Pittenger*, 421 U.S. 349 (1975) (upheld statute authorizing textbooks for private schools); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (upheld state non-categorical grant program for religious colleges); *Americans United for Sep. of Church & State v. Blanton*, 434 U.S. 803) (summarily aff'd) (1977) (state program of aid to students in colleges, including religiously-affiliated schools, does not violate Establishment Clause); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upheld religious school reimbursement for actual costs of state-mandated tests and reporting); *Mueller v. Allen*, 463 U.S. 388 (1983) (upheld tax deduction by religious school parents of education-related expenses); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (under vocational rehab program, upheld aid to blind person attending sectarian school of higher education to enter religious vocation); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)

Hunt v. McNair

In Section VI of their Brief, Appellants continue their argument that the trial court erred in granting summary judgment that the TIF arrangement does not violate the federal Establishment Clause. They assert that the trial court failed to properly apply *Hunt v. McNair*, 413 U.S. 734 (1973). In that case, the Supreme Court suggested that an Establishment Clause violation can be found "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." (Appellants' Substitute Brief at p. 65). Appellants thus invoke the "pervasively sectarian" branch of the Supreme Court's Establishment Clause jurisprudence, under which a school can be so sectarian--so single-mindedly devoted to the promulgation of religious doctrine--that any public funds flowing to the school would

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(government-provided interpreter does not violate Establishment Clause); *Agostini v. Felton*, 521 U.S. 203 (1997) (public employees may deliver remedial educational services on the parochial school campus); *Mitchell v. Helms*, 530 U.S. 1296 (2000) (federal act providing library books and educational equipment to K-12 schools is constitutional); *Johnson v. Economic Development Corporation of the County of Oakland*, 241 F.3d 501 (6th Cir. 2001) (Establishment Clause does not preclude tax-exempt bond financing for K-12 Catholic school); *Steele v. Industrial Development Board of Metropolitan Government Nashville,* 301 F.3d 401 (6th Cir. 2002) (Establishment Clause does not preclude tax-exempt bond financing for pervasively sectarian Church of Christ University).

necessarily advance religion and so violate the Establishment Clause.

The "pervasively sectarian" doctrine has been questioned, and it is unclear whether it survives today. Some members of the United States Supreme Court believe that students at even "pervasively sectarian" institutions should be able to take advantage of generally available public funds. *See Mitchell v. Helms*, *supra*, 530 U.S. at 826 (plurality opinion) (stating that the time period when whether a school was "pervasively sectarian" mattered in school aid cases is "one that the Court should regret, and it is thankfully long past.") Even if the doctrine survives, however, it does not apply here.

The term "pervasively sectarian" is most commonly applied to religious grade schools and secondary schools, which often have religious indoctrination as their primary purpose. Religious colleges and universities, many with excessively strong church ties, have been held not to be "pervasively sectarian," because of the academic freedom and institutional autonomy that now characterizes most institutions of higher education. Saint Louis University is not under the control of a governing church like the entity in *Hunt v. McNair* itself, where the Supreme Court found even it not to be "pervasively sectarian." *See also Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 755 (plurality opinion) (Catholic colleges where non-mandatory religious services are held, some classes are begun with prayers, there are mandatory religion or theology courses, and the great majority of students are Catholic, are not "pervasively sectarian").

In support of this argument, Appellants allege that they "pleaded facts showing that a substantial portion of SLU's functions are subsumed in its religious mission" and that such facts are "deemed true for the purposes of Summary Judgment" because "there

was nothing in Father Biondi's affidavit or other proper evidence that contradicted" such statements. (Appellants' Substitute Brief at pp. 66-67). This argument fails for the same reasons set forth above. First, Appellants' assertion about the pleadings is false; it ignores the fact that Saint Louis University properly denied the statement relied upon by Appellants in its Answer to Appellants' Counterclaim and thus brought forward no facts. (LF p. 93, ¶ 14). Second, a trial court's award of summary judgment will be upheld when it is "clear to [the] court and readily ascertainable from the record the facts on which the respondents were relying to negate the appellants' affirmative defense." *Rodgers*, 22 S.W.3d at 711. 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."

Even though the trial court's opinion does not specifically indicate that Saint Louis University's functions are not subsumed in its religious mission, an order of summary judgment may be affirmed under any theory that is supported by the record. *In re Estate of Blodgett*, 95 S.W.3d at 81. This is true even if the reason for affirming the trial court's entry of summary judgment is different from the reason given by the trial court for granting summary judgment. *Jennings*, 812 S.W.2d at 728.

The TIF Ordinances could not lead to excessive entanglement of the City of St. Louis with religion, and Saint Louis University is not "pervasively sectarian" as the

United States Supreme Court has used that term. The trial court thus correctly entered summary judgment for the University on Appellants' First Amendment claims.[18]

[18] As noted above, *amicus* Americans United makes a different argument under both the Establishment Clause and the state constitutional provisions, relying on *Hunt v. McNair* and other cases to argue that the TIF Ordinances are invalid for want of procedural safeguards. That argument is without merit, as shown in the "Procedural Safeguards" section of Argument I, above.

CONCLUSION

For the reasons stated, the trial court's grant of summary judgment should be affirmed.

Respectfully submitted,

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The undersigned counsel for Respondent hereby states:

1) The foregoing brief contains 17,969 words, which is within the applicable limitations in length set forth in Rule 84.06(b); and

2) Respondent is filing a floppy disk pursuant to Rule 84.06(g), appropriately labeled, containing the brief in Microsoft Word format. The submitted disk has been scanned for viruses, and the virus-scanning software has reported that the disk is virus-free.

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I hereby certify that two (2) copies of the foregoing Substitute Brief of Respondent Saint Louis University, together with a virus free 3½" disc containing the brief in Microsoft Word 2000, were served, by placing same in the United States Mail, postage prepaid, this _____ day of _____, 2007 to:

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