senting the hospital, which it leased to PCMHI, an entity formed to operate the hospital. In 1998, the County and PCMHI entered into an agreement to change the status of the hospital from a public facility to a private, not-for-profit hospital, and the County sold the hospital to PCMHI. The County had the right to appoint eleven members of the 20-member board governing the facility, and retained additional rights arising out of the indebtedness over the purchase price. The hospital received some state and federal funds but the County was not involved in its day-to-day operations. In arguing that the board was a state actor, Philips argued that a sufficiently close nexus existed between the government and the defendants' decision to suspend him, pointing to the County's control and the fact that the board was appointed exclusively by state actors. The hospital, arguing that it was a private, non-profit organization, moved dismiss the action. The district court granted the motion and, on appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed.

Any control by the County was "largely embodied in the reverter provision which help[ed] assure that PCMHI [met] Pitt County's objectives of care for the indigent and payment to the County of specified monetary obligations." The state's involvement with the board ended as soon as the members were approved; thus, the plaintiff needed to present additional evidence that the state actor used its authority to influence hospital practice or physician privilege decisions. The County representatives were entitled to attend the board meetings but they did not have voting rights, and were not, in fact, actually present for the consideration of the plaintiff's suspension. Therefore, the suspension of the plaintiff's privileges was not state action. *Philips v. Pitt County Memorial Hospital*, 572 F.3d 176 (4th Cir. 2009).

First Amendment
Animal Slaughter Ordinances

To follow up on an article that appeared in the last issue of the *Municipal Lawyer (Regulating Noah's Ark – Religious Freedom and Animal Control Issues*, by Bradford Bullock, in the July/August 2009 issue), the U.S. Court of Appeals for the Fifth Circuit has since released its ruling in the case involving the City of Euless's animal control ordinance. The ordinance permitted the keeping and slaughter of up to four "tablefare" birds in residential areas, regardless of the purpose for which the poultry were kept, but prohibited the keeping and slaughter of four-legged animals within its borders. The exceptions include the killing of vermin (which was permitted) and the killing of animals by animal control officers. The purpose for the keeping and slaughter ban was public health and safety, primarily based on the runoff of animal waste, flies, smells, noise, possible disease transmission. The ban allegedly prevented practitioners of the Santeria faith from performing ceremonies essential to their religion (Santeria rituals often involve the sacrifice of live animals). The plaintiff, José Merced, was a Santeria priest who performed the sacrifices at his residential property. After the City learned of this, Merced was told to stop, as this violated the ordinance. He sued the city, seeking a permanent injunction that prohibited Euless from enforcing an ordinance that burdened his religious practice, and alleging violations of state law (the Texas Religious Freedom and Restoration Act, or TRFRA), the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, and the First, Fifth, and Fourteenth Amendments. The district court dismissed the RLUIPA claim because no zoning laws were at issue, and concluded that the ordinance did not burden Merced's religious practice, and that it furthered compelling governmental interests and was the least restrictive means of advancing them.

The U.S. Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded. Under TRFRA, the ordinance substantially burdened the plaintiff's free exercise of religion without advancing a compelling governmental interest using the least restrictive means. The court held this finding obviated the need to address the remaining constitutional questions. It was undisputed that Merced's sincere religious beliefs motivated his conduct, and that his killings were sacrifices and not mere slaughter. A government's ban of conduct sincerely motivated by religious belief substantially burdened an adherent's free exercise of that religion, and Merced's ability to perform some ceremonies did not mean the ordinance did not burden other Santeria practices. The court found that, in essence, Merced had to choose between living in Euless and practicing his religion. The City had "absolutely no evidence" that Merced's religious slaughter undermined any of its interests, and the exception that allowed the keeping, slaughter, and disposal of a small number of fowl on a regular basis had "the same corrosive effect on the city's interests as infrequent sacrifices of a larger number of animals." Possibly less restrictive alternatives to the ban included a permit scheme for animal sacrifices, requiring Santeria adherents to comply with conditions designed to safeguard the City's interests. *Merced v. Kasson*, Nos. 08-10358, 08-10506, 2009 WL 2343172 (5th Cir. July 31, 2009).

Establishment Clause – Bible Distribution in School

Members of Gideons International had been allowed to hand out Bibles to students at the South Irons Elementary School for the past 30 years. In 2005, the School District Superintendent advised the school board that several attorneys (including the district's own attorney) had recommended discontinuing the practice on the basis that it was unconstitutional. The board declined to do so. A lawsuit followed in 2006, brought by the parents of several students, against the school district, members of the Board of Education, and school officials, alleging that the Bible distribution violated the Establishment Clause of the First Amendment. The district court granted a preliminary injunction enjoining the District from "allowing distribution of Bibles to elementary school children on school property at any time during the school day." In the meantime, the school district adopted a new policy. This provided that an organization wishing to distribute "any printed material" had to submit the material, in advance, to the superintendent for approval. All requests "shall be approved" unless

continued on page 34