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

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the material was libelous, obscene, or unlawful; advertised products or services for sale; endorsed a candidate for public office; promoted alcohol, tobacco, drugs, or other illegal activity; or was likely to cause substantial disruption at the school. If approved, the material could be distributed either in front of the administrative offices or at a table in a corner of the cafeteria. The plaintiffs amended their complaint to include the new policy. The District argued that plaintiffs were not entitled to a permanent injunction because adoption of the new policy made the challenge to the past practice of Bible distribution moot. The district court applied the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and concluded that the new policy violated the Establishment Clause because its purpose was "the promotion of Christianity" and its primary effect was "advancing religion by conveying a message of endorsement to elementary school children."

The U.S. Court of Appeals for the Eighth Circuit affirmed the judgment of the district court granting a permanent injunction, but reversed the district court's grant of a declaratory judgment. The declaratory judgment – that plaintiffs "shall have judgment against defendants ... on plaintiffs' complaint" was improper because the precise import of the declaratory judgment was "hopelessly obscure. Given its impact on the operations of a state governmental entity, this ambiguity alone require[d] reversal." Second, a declaratory judgment prohibiting implementation of the policy was both unnecessary and inappropriate, as the policy had never been implemented and was "constitutionally permissible in a host of other applications." Turning to the injunction, the court addressed the District's argument that the permanent injunction "impermissibly mandate[d] a content-based restriction on speech in the limited public forum created by the content-neutral [new] policy." The injunction was based on a judicial determination that the District had impermissibly endorsed a particular religion and its scope was facially reasonable. More specifically, it did not address the new policy or prescribe how the District could distribute other materials to students, and left open the possibility that the District might, in a neutral manner, facilitate Bible distribution by private parties, such as the distribution of flyers advertising off-campus or after-school distributions. *Roark v. South Iron R-1 School District*, 573 F. 3d 556 (8th Cir. 2009).

Litigation and Liability
Evidence of "Suicide by Cop"

Boyd was shot and killed by Officer Paine of the San Francisco Police Department after Boyd had attempted two separate kidnappings earlier that day. One of the victims called police and a high-speed chase of Boyd ensued. During the chase, Boyd fired at the pursuing officers. When Boyd pulled over, officers surrounded his car and ordered him to get out with his hands over his head and lie on the ground. Witnesses testified that Boyd put his hands up, walked towards the officers, then returned to his car. When Paine realized Boyd was reaching back into his vehicle with both hands, he fired three times, fatally wounding Boyd. Two weeks previously, police had stopped Boyd and found his rap lyrics, which advocated the murder of police officers; three days before the shooting, Boyd had been apprehended for reckless driving and struggled with the arresting officers, repeatedly screaming at them "kill me," and calling them "filthy white racists." The Boyd family sued San Francisco, alleging the police used excessive and deadly force. In its defense, the municipality relied on the expert testimony of Dr. Emily Keram, a forensic psychiatrist, who concluded that Boyd had been attempting "suicide by cop" – that he had purposefully drawn the police officers' fire to accomplish this result. The plaintiffs objected to the admission this testimony and to other evidence regarding Boyd's past (prior lawsuits filed by him or by his mother on his behalf against law enforcement agencies, evidence of his prior arrests, evidence of the rap music lyrics, and evidence that he was on drugs at the time of the shooting). After trial, a jury ruled in favor of the defendants and the plaintiffs appealed, arguing that the district court abused its discretion in allowing the admission of improper evidence at trial.

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed. As Officer Paine did not know the evidence of Boyd's past prior to shooting Boyd, the only issue in front of the jury was whether Paine's actions were reasonable based on his perspective at the time. "Under the relevancy analysis prescribed by the Federal Rules, all of [this] challenged evidence was properly admitted, since it had a tendency to make a fact of consequence more or less probable. … police assertions that [Boyd] was acting erratically, taunting police and goading them to shoot him instead of following police commands, is made more probable by [Boyd's] earlier statements to Oakland police, as well as evidence that he was on drugs at the time." His alleged resistance to the police was "also made more probable by evidence, in the form of expert testimony, that his actions were consistent with an attempt to commit suicide by cop." Addressing the expert testimony in light of Federal Rule of Evidence 702, the court below had ultimately concluded that Dr. Keram's testimony was based on a reliable foundation and was relevant to the issues before the court. The "suicide by cop" theory was supported by numerous studies and "Dr. Keram was careful to tie her conclusions in this case to the literature on suicide by cop, noting recognized factors or connections supporting her opinion." The plaintiffs did not dispute the existence of articles in support of the theory or present evidence, outside of their own assertions, that the theory was unreliable. With the exception of part of its ruling on the rap lyrics, the district court did not abuse its discretion in admitting the evidence or Dr. Keram's testimony. *Boyd v. City and County of San Francisco*, No. 07-16993, 2009 WL 2413794 (9th Cir. August 07, 2009).

Personnel and Employment
Employment Discrimination

Hobbs, an African-American woman, had worked for the City of Chicago since 1989 as a "Motor Truck Driver" in the City's Department of Transportation (DOT). In 2000, she was given new responsibilities as a lot supervisor, being