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Contracts: State's Revision of Liquor Regulations Does Not Modify Liquor Distributor's Pre-Existing Ten-Year Pricing Agreement

LL Liquor, Inc. v. State of Montana, No. 17-35405 (9th Cir. Dec. 28, 2018).

Reversing the lower court, the Ninth Circuit has found that a liquor distributor's long-term pricing agreement with the Montana Department of Revenue was not modified by a pricing scheme subsequently adopted by the state legislature.

As in many states, liquor is regulated at the state level in Montana, and local governments navigate and regulate in tandem with the state regulatory framework. In Montana, all alcohol must be purchased from the state, which previously meant each store negotiated a price contract with the Montana Department of Revenue (MDOR). The Montana legislature recently enacted a new law that set a uniform pricing scheme for all stores. LL Liquor, Inc. (LL) had a negotiated contract for a ten-year term. The new statute was enacted during the term, leading the MDOR to force a rate change - an increase - on LL. LL filed a contract claim, alleging the rate it had already negotiated controlled. The district court agreed with the state, but the Circuit overturned the ruling.

The Circuit found a couple elements noteworthy about the contract language. For one, it included a provision that the rates agreed to therein "may be reviewed every three years, as provided by law." Second, the contract cited to a *then-existing* state code provision that mandated a liquor store's consent (here LL) to change contracted rates. While Montana argued that the legislature had repealed the code provision in question, the Ninth Circuit reminded it that under Montana law "laws existing at the time a contract is formed *become part of the contract" when it is an "integral component*" of the contract. The Circuit saw these provisions as an integral component.

Arguably the most persuasive argument of the MDOR was that Section 11 of the contract stated "the Department of Revenue may amend or modify this Agreement *to conform to changes in state or federal laws*" and that "any change *required by a change in Montana law shall be effective immediately* upon the effective date of such change in law, notwithstanding the failure of a party to agree in writing to such change." But the Circuit, unlike the district court, rejected this, noting the ten-year term of the contract was "critical to LL Liquor's business plan and to the success of L[L] Liquor's business" and, given that and the previously-discussed "preservation of the term [contract provision], [the Circuit] doubted that, by agreeing to section 11, LL Liquor unwittingly welcomed a Trojan Horse containing within itself the seeds of destruction of its own business." In short, the Circuit thought the *specific* contract language of Section 2 superseded the *general* language of Section 11, meaning that "Montana promised that LL Liquor's commission rate would not change during the term of the agreement without LL Liquor's consent. State Bill 193's enactment broke that promise and thus breached the agreement."

LINK

Searches: Urine Drug Tests by All Substitute Teacher Applicants Does Not Violate Fourth Amendment

Friedenberg v. School Board of Palm Beach County, No. 17-12935 (11th Cir. Dec. 20, 2018).

In a case of first impression, the Eleventh Circuit has interpreted Supreme Court precedent in analogous circumstances to uphold a local school board's requirement that all applicants for substitute teacher positions submit to urine drug testing, finding that the community's needs to assure safety of public school children is paramount.

While all suspicionless searches by the government are presumptively unconstitutional, there are exceptions - namely, where they serve sufficiently powerful and unique public needs. The Eleventh Circuit recently took on a matter of first impression in this area: the issue of "whether a county school board may require all applicants for substitute teacher positions to submit to and pass a [urine] drug test as a condition of employment." In 2017 Joan Friedenberg (Friedenberg) sued the Palm Beach School Board (School Board) in district court, claiming that the requirement of suspicionless drug testing of school employment applicants violated the Fourth Amendment. The district court found in favor of the School Board and Friedenberg filed an interlocutory appeal.

When the government claims it has a "special need" for an exception to the Fourth Amendment's warrant requirement, a court balances the public and privacy interests. In circumstances "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." The Eleventh Circuit, faced with this novel question, used the Supreme Court's previous five special needs cases as guideposts. From them it derived a basic outline, including that public schools are unique, that the Court previously deemed testing all student athletes constitutional, which rationale the Court then extended that to "competitive" student extracurricular activities of every kind, and

finally that relevant employment decisions demonstrate that employees engaged directly in drug interdiction or those required to carry firearms can be tested without suspicion. It reduced these cases to the general principle that schools have a "legitimate need to maintain an environment in which learning can take place," so much so that students can be tested without warrant or suspicion and that, coupling that with the employment cases, indicates where drug use or intoxication would present a significant risk to public safety, adult employees in safety-sensitive positions may similarly be tested.

The Circuit then looked at the facts in the case: the School Board accurately identified a danger posed by intoxicated teachers; it had a compelling interest in ensuring that teachers -- including substitutes - were not habitual drug users; the School Board had a powerful need to protect students, and that parents are compelled, under force of law, to place their children in the care of the schools. Friedenberg countered that, while there is a possibility of risk, it is speculative and hypothetical. The court disagreed: dangerous situations arise in schools and *all* teachers are the first-line of defense to protect and secure children.

The Circuit then moved on to balancing the privacy interests involved using the Supreme Court's four-factor test: "the strength of the individuals' expectation of privacy, measured in light of their chosen profession or special status; the nature and extent of the testing regime's intrusion on privacy; the nature of the government's special need; and the testing regime's efficacy at achieving the government's aims." The Circuit found it relevant that teachers are public employees, that they work with children and are specifically tasked with caring for the needs for the full day of other people's children, that the industry is highly-regulated, that the test selected here - urine - is less invasive than other types, that, even though the test could be "beaten" and is not perfect, urine tests are objectively "an effective means of deterring" the undesirable behavior targeted, particularly in light of the random timing of the pre-employment test.

The lower court was affirmed and a new class of special testing was recognized in the Circuit.

LINK

Seizure: Impounding Vehicles from Drivers without California Licenses Not Justified under "Community Caretaking" Standards

Sandoval v. County of Sonoma, No. 16-16131 (9th Cir. Dec. 21, 2018).

Where local police, relying on a California statute, impounded two vehicles from drivers with Mexican driver's licenses but who did not have California licenses, that warrantless seizure was subject to "community caretaking" analysis under the Fourth Amendment, which required an individualized determination that the vehicles jeopardized public safety.

Officers in the California's Sonoma County (County) and City of Santa Rosa (City) impounded two vehicles without a warrant upon determining that the drivers did not have California licenses - both were unlicensed in California but had Mexican driver's licenses. The officers relied on California Vehicle Code § 14602.6(a)(1), which provides that a peace officer may impound a vehicle for thirty days if the vehicle's driver has never been issued a driver's license. The individuals filed §1983 cases and the district court granted summary judgment for the drivers on their Fourth Amendment claims that the impoundment was an unlawful seizure of property.

As for impounding the vehicles without a warrant, the County argued the court should categorically balance California's interest in deterring unlicensed drivers against all drivers'

interests in maintaining possession of their vehicles. The court did not do so, but rather noted it had previously held that California's interest in keeping unlicensed drivers off the road is governed by the "community caretaking" exception, which permits government officials to remove vehicles from the streets when they "jeopardize public safety and the efficient movement of vehicular traffic." Thus, the County and City officers were not *categorically* permitted to impound the vehicles of unlicensed drivers because state law provides for it; rather, *an individualized determination* needed to be made under the caretaker exception to the Fourth Amendment for each vehicle impounded.

As for whether the conduct of the County and City officers in each specific case comported with the Fourth Amendment, the Court held neither did. The problem for the local governments was that once the community caretaker function was discharged - i.e. the initial safety justification for the impoundment was satisfied - in neither case did the government *have any further* justification for the seizure. In its case, the County relied on arguments about general deterrence and administrative penalties as a rationale to support California's interests in impounding vehicles of unlicensed drivers, which failed. Unfortunately, the County's additional arguments were deemed waived since it failed to make them in the lower courts. In the City's case, once the driver identified a *licensed driver who could take possession* of the truck, its community caretaking function was discharged, and the Circuit determined the City satisfied no caretaker function by denying the vehicle to that licensed driver. The Circuit panel upheld the lower court's ruling.

LINK

Social Media: Politician's Official Facebook Page which Invites Constituents' Comments is a Public Forum; Blocking of Critic Constitutes State Action and Viewpoint Discrimination

Davison v. Randall, No. 17-2002 (4th Cir. Jan. 7, 2019).

Taking a lead in the as-yet unsettled question of whether a politician's social media presence is susceptible to public forum analysis, the Fourth Circuit has upheld a lower court determination that, where a local politician uses her Facebook page to communicate official messages and invites constituents to provide comments to the page, her actions in selectively blocking a critic's ability to post on her page constitutes state action and amounts to a denial of the critic's free speech rights in a public forum. Although the politician's own commentary on the page amounted to "government speech," that characterization did not extend to the public comments, over which she did not exercise control.

Phyllis Randall (Randall), Chair of the Board of Supervisors of Loudon County, Virginia (County) administered the "Chair Phyllis J. Randall" Facebook page. Through that page, she (and her chief of staff) communicated with her constituents-alerting them to safety issues, notifying them of upcoming public events, reporting on meeting results, and describing her activities and accomplishments, among other things. She invited the public to communicate with her:

> I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, complement or just your thoughts. However, I really try to keep back and forth conversations (as opposed to one-time information items such as road closures) on my county Facebook page (Chair Phyllis J. Randall) or County email (Phyllis.randall@loudoun.gov). Having back and forth constituent conversations are Foiable ([Freedom of Information Act]) so if you could reach out to me on these mediums that would be appreciated.

Randall publicized the "Chair's Facebook Page" in her official "Chair Phyllis J. Randall" newsletter, which was prepared by County employees, hosted on the County's website, and distributed to County residents using Randall's official county email account. The newsletter ended with the words "STAY CONNECTED" and a Facebook icon that hyperlinked to the Chair's Facebook Page.

Brian Davison (Davison) is an outspoken County resident who "focuses his civic engagement and expression on the funding and . . . management of public schools." On February 3, 2016, Davison asked a question at a Loudoun town hall meeting attended by the Loudoun County School Board and Randall, implying financial improprieties by School Board members. Randall characterized the inquiry as a "set-up question" and stated that it was not appreciated. Davison took issue with Randall's reaction and posted about it on Twitter during the meeting, including a tag to the "Chair Phyllis J. Randall" Facebook page. When Randall later posted an account of the town hall meeting to her page, Davison posted his allegations of financial misdealing to Randall's page using a Facebook page he manages.

Randall responded by deleting Davison's entire post and threads, and blocked Davison's Facebook page from commenting on the "Chair Phyllis J. Randall" Facebook page. The next morning, she reconsidered and restored Davison's access.

Davison filed a § 1983 suit against the County and Randall in her official and personal capacity alleging the "banning of Davison from commenting on Chair Phyllis J. Randall Facebook Page is viewpoint discrimination." (He did not contest the deletion of his postings). Among various holdings, the district court concluded Davison established a material dispute as to whether the Chair Phyllis J. Randall Facebook Page amounted to a limited public forum and whether Randall, in her individual capacity, acted under color of state law in banning Davison from it. After a one-day bench trial, the court dismissed the County, finding that it had no control or authority over Randall's Facebook page, but ruled for Davison on his First Amendment claims (although Davison's request for injunction was not granted).

Randall appealed, arguing that (A) Davison failed to establish standing to obtain prospective declaratory relief based on Randall's alleged First Amendment violation; (B) the district court erred in concluding that Randall acted under "color of state law" when she banned Davison's Facebook page from the Chair's Facebook Page; and (C) the district court erred in concluding that Randall's banning of Davison's page violated the First Amendment.

Standing: The Fourth Circuit found that standing had been established based on the likelihood of prospective injury-Davison was likely to comment again on Randall's activities, and she was again likely to restrict his access.

Color of State Law: The court also found that Randall acted "under color of state law," in administering the Chair's Facebook Page and banning Davison from it. The legal analysis hinged on whether Randall had exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law:"

> Although no one factor is determinative, this Court has held that a defendant's purportedly private actions bear a "sufficiently close nexus" with the State to satisfy Section 1983's color-of-law requirement when the defendant's challenged "actions are linked to events which arose out of his official status." When a defendant's "status" as a public official "enabled [her] to execute [a challenged action] in a manner that private citizens never could have," then the action also is more likely to be treated as attributable to the state.

The Circuit found persuasive the fact that Randall administered the Facebook page, "swathed" it in official titles and symbols, and used it as "tool of governance," in a manner that no private citizen could have. Also notable was the fact that the actions giving rise to the case were all linked to Randall's official actions at a governmental event.

First Amendment: The Circuit's First Amendment analysis required a determination of the nature of the forum involved: under *Pleasant Grove*, governmental entities are "strictly limited" in their ability to regulate private speech in public fora, which include "traditional public forums" such as streets, sidewalks, and parks and "limited" or "designated" forums which are not traditional, but which the government opens to the public for expressive for expressive activity. The court noted that "neither the Supreme Court nor any Circuit has squarely addressed whether, and in what circumstances, a governmental social media page . . .constitutes a public forum." (Two recent lower court decisions reached opposite conclusions: *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1010 (E.D. Ky. 2018) (held that First Amendment forum analysis did not apply to restrictions on speech in the official Facebook and Twitter pages of the Governor of Kentucky), while *Knight First Amend. Inst. at Colum. Univ. v. Trump* , 302 F. Supp. 3d 541, 573 (S.D.N.Y. 2018) found that the interactive component of the President's Twitter account, as opposed to the President's tweets themselves, constituted a designated public forum).

Here, the Circuit found that Randall had intentionally opened the Chair's Facebook Page to public comment, and was "compatib[le] with expressive activity." It noted that the Supreme Court recently analogized social media sites, like the Chair's Facebook Page, to "traditional" public forums, characterizing the internet as "the most important place[] (in a spacial sense) for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Randall's Facebook page had "hallmarks" of a public forum, including her opening the "comment" section for public discourse without any restrictions on access; in fact, the page had become a place where discussion of matters of public concern took place over the years. The Circuit also pointed out that the internet and interactive computer services have been deemed compatible with expressive fora.

These characteristics outweighed Randall's argument that "(1) the Chair's Facebook Page is 'a private website' and therefore does not constitute 'public property' susceptible to forum analysis, and (2) the Chair's Facebook Page, in its entirety, constitutes 'government speech' properly analyzed under the framework set forth in *Pleasant Grove.*" The first argument was easily disposed of since private property dedicated to public use has historically been subject to forum analysis (for example, a Second Circuit decision construing privately-owned cable television franchises which are required to provide public-access channels). The Circuit found her argument to be illogical:

> Not only does case law contradict Randall's argument that public forum analysis never applies to private property, her argument also fails because it makes no legal sense to establish a bright-line rule that forum analysis applies only to government-owned property. Why, for example, should the First Amendment allow a municipality to engage in viewpoint discrimination in curating a public library branch in leased space but not allow the municipality to engage in such discrimination in a library branch on municipally owned property?

Randall's second argument also failed, because it did not distinguish between Randall's own posts on the Facebook page - which were government speech - and the public's comments and interactive elements therein - which were not. This meant she did not retain "final approval authority" - a key element in the Supreme Court's *Pleasant Grove* government speech case.

LINK

Sovereign Immunity: Sheriff's Office was not "Arm of the State" in Conducting Child Protective Services Investigations

Freyre v. Chronister, No. 17-11231 (11th Cir. Dec. 14, 2018).

Although state standards substantially dictated many of the activities of a county sheriff's office in conducting child protective services investigations, the sheriff could not claim 11th Amendment sovereign immunity status when sued by a state resident whose child had been removed.

The Florida legislature passed a law in 1998 that required the Florida Department of Children and Families (DCF) to transfer all responsibility for child-protective investigations in certain counties to the county sheriff. The legislation required adherence to state standards, mandating that sheriffs must "operate, at a minimum, in accordance with the performance standards and outcome measures established by the Legislature for protective investigations conducted by the Department of Children and Families."

The Hillsborough County Sheriff's Office (HCSO) conducted such investigations and, in doing so, it took on a case wherein Doris Freyre (Freyre) was suspected of neglecting her disabled child. Ultimately her child was removed from the home and transferred to various care facilities, all of which culminated in Freyre asserting claims under the Americans with Disabilities Act, the Rehabilitation Act, and §1983 for infringement of her Fourteenth Amendment rights against HCSO and various individuals including Sheriff Chronister. One issue in the case meriting discussion was HCSO's argument that it was entitled to Eleventh Amendment immunity when performing child-protective investigations. The district court denied this argument at the summary judgment stage, prompting an immediate interlocutory appeal from HSCO to the Circuit Court.

The Circuit outlined the basic framework that the Eleventh Amendment has been uniformly extended to prohibit suits against a state in federal court brought by the state's own citizens, but *not* to municipalities in general. For an officer to obtain the protection, which can arise on a case-by-case basis, s/he must be acting as an arm of the state, not an arm of the county - a determination made by considering four factors "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity."

Analyzing these four factors resulted in mixed outcomes. In terms of how the state defined the entity, even though sheriff's deputies are, by default, county officers in Florida, in this case the officer was executing a state policy-however, the relevant state law clearly calls out the officers as "independent contractors," a factor which weighed *against* finding that the officer acted here as an arm of the *state.*

As for the "degree of control" factor, even though the state law does set minimum standards and although the state exerts substantial control over HCSO for child protective investigations (from financial reports to performance evaluations), the Circuit found none of that overrode the "local nature" of the sheriff's office under Florida law. It therefore rated the degree of control factor as "neutral."

In terms of funding, since "DCF provides all funding for child-protective investigations, and Freyre does not contest this . . . this factor weighs in favor of arm-of-the-state status."

The final factor-who was responsible for judgments--was determinative, and it weighed *against* arm-of-the-state status. While the HCSO staff testified that any judgment in the case would be paid directly out of DCF grant money received by the HCSO to do child-protective work, the Circuit found that improbable. First, the state law that provides the money to counties for child-protective services says it can be used for "providing child protective investigations," not judgments; second, HCSO is self-insured, and third, the Circuit has already acknowledged that "no provision of Florida law provides state funds to a Florida sheriff to satisfy a judgment against the sheriff." The denial of immunity was affirmed.

LINK

Speech: Qualified Immunity Reversed where Mayor Harassed Outspoken Resident; Town's Actions May Also Constitute "Policy"

Aydelotte v. Town of Skykomish, No. 15-35885 (9th Cir. Dec.24, 2018).

Re-evaluating a series of actions taken by a mayor and other officials against a resident who alleged corruption rose, the Ninth Circuit has reversed a grant of qualified immunity to the mayor and required a more thorough analysis of whether actions by a variety of other officials rose to the level of a "policy."

The small Town of Skykomish, Washington (Town) has been enveloped in controversy for a few years, during which time George Richard Aydelotte (Aydelotte) has been vocal and active in seeking to uncover what he believed was corruption. He criticized Town officials and filed a complaint with the Washington Public Disclosure Commission - First Amendment protected conduct. He alleged that, after his filing, the mayor in particular, and municipality in general, retaliated by having his fence destroyed, ticketing and threatening to tow his vehicle, excluding him from the start of a public meeting, instructing him to remove his signs protesting the Town government, and threatening him with eviction from his property. He filed a §1983 suit, alleging the Town and officials thereof were retaliating against him for his First Amendment protected speech. The district court dismissed the case, but the Ninth Circuit determined that dismissal was premature.

First, the Circuit found the lower court failed to view the facts in the light most favorable to Aydelotte, thus inappropriately granting qualified immunity to the mayor. It also found fault with the lower court viewing all the harassing behavior alleged - over years - as separate, individual incidents rather than a retaliation "campaign of harassment and humiliation." Finally, it also thought there were still material facts in dispute. Putting all three together, it reversed the lower court on qualified immunity because "state action designed to retaliate against and chill political expression strikes at the heart of the First Amendment," meaning Aydelotte may well have a viable case. The Circuit was also none too thrilled with the mayor explicitly threatening Aydelotte by saying "he would need to behave to continue to live there" when they had discussed his vehicle ticketing.

After reversing the case against the mayor, the Circuit also found the lower court incorrectly determined the Town could not be held liable as a municipality because additional facts - including an official destroying a rock foundation at Aydelotte's property, a building inspector threatening him, and the then-Deputy Sheriff threatening to prosecute him - did indeed create a genuine dispute as to whether a reasonable jury could find "a longstanding [policy] or custom" by the Town. Aydelotte succeeded in his appeal and the case was remanded for further proceedings.

LINK

Speech: School Committee Meeting Which Allows Public Comment Period is Public Forum; Critical Viewpoints Cannot be Silenced

Spaulding v. Town of Natick School Committee, No. 2018-01115 (Mass. Super. Ct. Nov. 21, 2018).

A local school board's public meetings policy which prohibits "improper" behavior and

language and which resulted in various speakers being silenced before they could express criticisms of the school system failed to survive strict scrutiny review. ***(Thank you to member Jim Lampke for notice of this decision).***

Corey Spaulding (Spaulding) and Karin Sutter (Sutter) commenced an action against the Town of Natick School Committee (School Committee) and individual officials including the School Committee chair, alleging constitutional and statutory violations arising out of three meetings before the School Committee.

School Committee meetings are open to the public and allow for a 15-minute "Public Speak" segment. School Committee "Participation Policy" rules for such meetings include:

> Improper conduct and remarks will not be allowed. Defamatory or abusive remarks are always out of order. If a speaker persists in improper conduct or remarks, the Chairperson may terminate that individual's privilege of address.
>
> Speakers may offer such objective criticisms of the school operations and programs as concern them, but in public session the [School] Committee will not hear personal complaints of school personnel nor against any member of the school community. Under most circumstances, administrative channels are the proper means for disposition of legitimate complaints involving staff members.

At a School Committee meeting in January 2018, Spaulding identified herself at the podium and said, "I am the mother of a child that was mercilessly bullied into suicide here in Natick." The individual defendants interrupted her, saying "Stop it right now. Stop it right now. That is unfettered lies" and "We're ending this right now .... the police will be called ... "

Spaulding was subsequently escorted from the building by police. She later received a notice from the School Committee chair to the effect that she would be cited for trespass should she enter school administrative grounds: "Since you declined to schedule a meeting with me to discuss your inappropriate and disruptive behavior, I am herby [sic] issuing this letter ofno trespass. Consequently, upon receipt of this letter, you are hereby forbidden from entering upon the premises of the central administrative offices at 13 East Central Street in Natick. Failure to comply will result in legal action, including, but not limited to police notification and arrest."

Sutter was similarly silenced at two subsequent meetings after she began to criticize the Natick school system. Lawsuits followed.

Defendants argued that the Public Speak portion of the School Committee meetings constituted a limited public forum and that, under the appropriate level of scrutiny, the Participation Policy was constitutional. The court disagreed, citing the School Committee's own characterization of the Public Speak segment: "Public Speak is a segment of the School Committee meetings which the [School Committee] 'has opened for use by the public as a place to assemble'". . . ."The court therefore concludes that Public Speak is a designated public forum."

The appropriate standard of review was strict scrutiny, meaning that any regulation of speech must comprise reasonable time, place and manner restrictions, narrowly tailored to serve a compelling state interest. While the defendants contended that the Participation Policy provisions in question were narrowly tailored to further their compelling interest "in protecting student and staff privacy, promoting a learning environment that fosters success, maintaining a positive workplace for its employees, prohibiting bullying, and conducting the School Committee's business in an orderly and efficient fashion," the court disagreed. Vague terms such as a prohibition against "improper" remarks allowed for content-based discrimination by the School Committee.

Plaintiffs obtained a declaration that provisions of the Participation Policy were unconstitutional, and the individual defendants were unsuccessful in asserting qualified immunity.

LINK

THIS JUST IN:

Update on the Tennessee Billboard Case

Thomas v. Schroer is a case from the Western District of Tennessee involving a challenge to the state's prohibition of billboards located on public byways. The appeal in that case is scheduled to be heard in the Sixth Circuit (Cincinnati) on January 30, and we will update you on subsequent developments. IMLA joined in an amicus brief in that case seeking to uphold the Tennessee statute; that brief argues that *Reed* does not abrogate on-premise / off-premise distinctions:

> Amici urge that the opinion in *Reed v. Town of Gilbert*, as applied to noncommercial speech, be properly understood. Amici urge that it be understood that the commercial speech doctrine has not been changed by *Reed*, which means that §§ 54-21-103(2) and 54-21-107(a)(3) of the Tennessee Billboard Regulation and Control Act of 1972 (the "Act") remain constitutional for that reason and prior precedent. In the Supreme Court's majority opinion in *Reed*, Justice Thomas stated that the starting point of analysis as to whether a law is Constitutional is whether the law is, on its face, content based. The provisions before the Court in Reed required an examination under strict scrutiny because there were different standards for different categories of temporary noncommercial speech. In contrast, the Act has provisions that touch upon speech that could be either commercial or noncommercial. As such, there is nothing that calls for strict scrutiny on the face of the Act. Three of the six Justices that made up the majority in *Reed* cautioned that "properly understood," their decision allows the onsite/offsite distinction, a locational distinction, to remain a content-neutral distinction.

Miami Overturns Airbnb Injunction Against Short-Term Rental:

In December, the City of Miami succeeded in reversing an injunction which had been obtained by Airbnb et al against the City's restrictions against short term rentals.

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