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To: Clients & Friends

From: Petrini & Associates, P.C.

Date: October 14, 2021

Re: **Discussion of Three Significant Cases: Marijuana Regulation Mandatory COVID-19 Vaccinations Government Speech and First Amendment**

P&A CLIENT ADVISORY 2021:01

Fall greetings from all of us at P&A. This client advisory will review three important decisions issued in 2021, one discussing marijuana regulation and contracting, a second discussing the scope and application of vaccine mandates by public employers, and a third that explores the scope of the government speech doctrine in the context of First Amendment establishment and free exercise of religion claims.

1. Mederi, Inv. v. City of Salem, 488 Mass. 60 (2021) ("Mederi") (by Christopher J. Petrini)

In a case of first impression before the Massachusetts Supreme Judicial Court ("SJC"), the SJC recently issued a decision ruling in favor of the City of Salem finding that the Plaintiff, Mederi, Inc. ("Mederi") had failed to sustain its "heavy" burden to demonstrate that Salem acted arbitrarily or capriciously when it denied Mederi a Host Community Agreement ("HCA") to operate a retail marijuana establishment in the City.

Mederi was one of eight applicants competing for an HCA, which is required under M.G.L. c. 94G, § 3(d) to apply for a license from the Cannabis Control Commission. In 2018, Salem enacted an ordinance limiting the number of retail marijuana establishments to "no more than 20% of the number of package store licenses." At the time when Mederi applied for an HCA, there were only four retail marijuana licenses available.

Salem's application review committee recognized that Mederi's application would improve the condition of a blighted commercial property and enhance geographic diversity, but ultimately decided that Mederi's application was not as strong as the others because it lacked sufficient capitalization and direct experience in the industry. Mederi, 488 Mass. at 69. The City informed Mederi that it had not been chosen to advance to the next round of consideration. Mederi sued, seeking an order requiring the City to enter into an HCA and requesting certiorari review of the City's rejection of its HCA application. After some procedural jousting, the Superior Court ultimately allowed the City's motion to dismiss Mederi's certiorari claim. The Supreme Judicial Court transferred Mederi's appeal on its own motion.

In reviewing M.G.L. c. 94G, the SJC observed that "[n]othing in the governing statute imposes a duty to enter into an HCA with a prospective recreational marijuana establishment simply because that establishment is able to fulfill the municipality's HCA requirements." Id. at 66. Further, no City ordinance required the City to enter into an HCA. Accordingly, the SJC affirmed the Superior Court, explaining that "[b]ecause a municipal-

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ity may use its discretion in determining whether to enter into an HCA with a prospective retail establishment, mandamus relief is not available." Id. at 66.

As to Mederi's certiorari claim, the SJC held that the City's review of HCA applications allowed administrative discretion, requiring only that the City have a rational basis for its decision to enter into an HCA. Determining that the City had articulated a rational basis for not entering into an HCA with Mederi, the SJC found that the City's decision was neither arbitrary nor capricious. Id. at 68. With respect to Mederi's claim that that the City improperly charged HCA recipients, the court determined that Mederi did not have standing to contest the City's HCA fees because it never executed an HCA. Id. at 71.

Although Mederi lacked standing to contest the payments the City requires of its HCA partners in excess of the community impact fee, the SJC acknowledged the concern raised. Noting that the applicable statutory provisions and regulations are silent as to payments to municipalities, the Court noted that the practice of requiring HCA partners to make payments in addition to the community impact fee has the potential to create an unfair advantage for municipalities and better funded applicants and may create a barrier to entry for prospective economic empowerment priority applicants. Id. at 73.

Mederi makes clear that where a municipality follows its written policy for review of HCA applications, the municipality's decision is entitled to deference that is subject only to rational basis review. Not addressed in the Mederi decision, but only because the plaintiff did not have standing as to the issue, is the extent to which municipalities may require payment from its HCA partners in excess of the community impact fee permitted under M.G.L. c. 94G, § 3(d).

2. State Police Association of Massachusetts v. Commonwealth of Massachusetts, Suffolk Superior Court Docket No. 2184-CV-02117: The Latest on COVID-19 Vaccine Mandates (by Christopher L. Brown, Esq.)

Several of our clients have had questions on the legal issues to consider in potentially implementing a requirement for employees to be vaccinated against COVID-19. Generally, vaccine mandates in the workplace are legal, subject to an employer's bargaining obligations with the unionized portion of its workforce. The contours of what that obligation to bargain might be are starting to come into focus in Massachusetts with an important decision issued by Superior Court Judge Jackie Cowin on September 23, 2021 in a case brought by the State Police Association of Massachusetts ("SPAM") challenging Governor Baker's Executive Order 595 ("E.O. 595"), which requires all Massachusetts Executive branch employees to be fully vaccinated by October 17, 2021.

SPAM's lawsuit requested a preliminary injunction blocking implementation of E.O. 595 until after the defendants had engaged in collective bargaining with the Union over the impacts of the order. In addition to seeking injunctive relief in the Superior Court, SPAM also filed a Charge of Prohibited Practice with the Division of Labor Relations ("DLR"), alleging that the defendants failed to comply with their statutory bargaining obligations under G.L. c. 150E.

Applying the long-established test for injunctive relief, Judge Cowin found that an injunction blocking the vaccination requirement from taking effect was not warranted and denied SPAM's motion. The Court found that the Union had not shown any irreparable harm to its membership, noting that many of the potential harms alleged, such as loss of employment for employees who refuse to be vaccinated, were economic

harms which could redressed after the Union's DLR case is decided if the agency in fact decided that the Commonwealth failed to meet its bargaining obligations. The Court further decided that the Commonwealth's interest in protecting the health and safety of its workforce, those who come into contact with its workforce, and the public in general, outweighed the Union's interest in exercising its right to bargain the terms and conditions of its members' employment.

An important consideration in reviewing the SPAM decision is what it did not decide. Because the Union failed to meet the other elements for injunctive relief, Judge Cowin declined to decide if the Union had shown a likelihood of success on the merits, leaving a key dispute between SPAM and the Commonwealth, whether the Commonwealth met its bargaining obligation relative to the vaccination mandate, for another day. There is no real argument whether the Commonwealth had a bargaining obligation as a vaccine requirement is clearly a matter affecting the terms and conditions of employment. However, the degree of bargaining required before implementing a public health and safety measure like a vaccine mandate is what will ultimately be determined by the DLR, assuming the parties do not otherwise resolve the matter as they are continuing to negotiate. The takeaway of the SPAM decision is that while employers should continue to comply with their bargaining obligations, employers can implement a vaccine mandate if they are unable to reach resolution with affected unions within a reasonable time.

3. Shurtleff, et al. v. City of Boston - Government Speech at Boston City Hall, 986 F.3d 66 (2021) (by Shawn J. Petrini, Law Clerk)

A decision by the United States Court of Appeals for the First Circuit issued earlier this year provides guidance to local governments regarding the delicate interplay between government speech against claimed violations of the free speech, establishment and free exercise clauses of the First Amendment. In Shurtleff v. City of Boston, 986 F.3d 66 (2021), plaintiff brought suit against the City of Boston after their application to fly a "Christian Flag" was rejected. The District Court granted summary judgment in favor of the City and the First Circuit upheld the District Court decision on appeal, reasoning that that the government speech doctrine permits municipalities to refuse to fly "religious flags" in government speech forums without violating the First Amendment.

The City's banner policy permits third party banners to be temporarily raised from one of three publicly owned flagpoles at City Hall Plaza in conjunction with an event there. Examples of secular flags flown in the past included Portuguese, Turkish, and Pride flags. In its decision, the First Circuit recognized that while the First Amendment restricts government regulation of private speech, the same constraints do not apply to government speech, when the government is speaking on its own behalf. The Court applied a three-pronged test to determine whether the flags constituted government speech by evaluating (i) the history of the place; (ii) the purpose and nature of the speech; and (iii) the government's level of control over the place or item at issue. As to the first prong, the Court found that governments have employed flags throughout history to communicate their values. As to the second prong, the Court determined that the public would attribute the message of a third-party flag raised at City Hall Plaza as a message of the City. Finally, the Court held that the City "effectively controlled" the messages conveyed by third-party flags because the City retained final approval authority over flag raisings. 986 F.3d at 91.

This analysis led the Court to hold that "[b]ecause the City engages in government speech when it raises a third-

party flag on the third flagpole at City Hall, that speech is not circumscribed by the Free Speech Clause. … The City is therefore 'entitled' to 'select the views that it wants to express.' … This entitlement includes both the right to decide not to speak at all and the right to disassociate itself from speech of which it disapproves…Here, the City exercised those rights by choosing not to fly the parties' third-party flag." 986 F.3d at 94 (citations omitted). Opposition to the views expounded by the City may be expressed in the voting booth: "Should the citizenry object to the City's secular flag policy or to its ideas about diversity, the voters may elect new officials who share their concerns. After all, it is the electorate and the political process that constrains the City's speech, not the Free Speech clause." Id.

The plaintiffs' claims under the Establishment Clause of the First Amendment alleged that the City discriminated against religion through their policy of exclusively flying secular flags. The plaintiffs further asserted that the City discriminated between religions by excluding their flag while raising flags that contained religious imagery (specifically the Turkish and Portuguese flags). With respect to the latter contention, the First Circuit held that the mere presence of religious imagery does not make a flag religious and that the proffered flags represent the named nations rather than any religion. The Court held that because the City has maintained a policy of neutrality towards religion, "no violation of the Establishment Clause occurred when the City elected not to fly the plaintiff's Christian flag." 986 F.3d at 97. Finally, the Court made clear that "on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used." Id. at 98.

The Shurtleff decision affirmed the vitality of the government speech doctrine. So long as the relevant criteria are satisfied, the government is generally permitted to convey the speech it chooses to convey, and to decline to speak or display other speech which it may not agree with. Further, the religious neutrality portion of the opinion is particularly relevant for any municipality wishing to avoid litigation from religious groups seeking to display their imagery on government grounds. Without a religious neutrality policy, if a municipality were to permit a Christian flag or symbol of some kind to be displayed in a governmentally controlled forum, then the municipality likely would be required to allow any number of religious groups to display their imagery in the same manner or risk opening itself to First Amendment litigation.

The U.S. Supreme Court granted certiorari to Shurtleff v. City of Boston, on September 30, 2021. Petrini & Associates will keep all clients informed as to the final resolution of this case.

We hope you have found this client advisory informative. If you have any questions regarding this client update, please do not hesitate to contact us.

This client advisory is for informational purposes only and does not constitute legal advice, which will vary based on the particular issues and circumstances presented. If you wish to obtain legal advice, please contact us. Thank you.