Rel: November 27, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180342

State of Alabama

v.

City of Birmingham and Randall L. Woodfin, in his official capacity as Mayor of the City of Birmingham

Appeal from Jefferson Circuit Court
(CV-17-903426)

BRYAN, Justice.

The State of Alabama appeals from a judgment entered by the Jefferson Circuit Court ("the circuit court") in favor of the City of Birmingham ("the City") and its mayor, Randall L.

Woodfin ("the mayor"),[1] in the State's action seeking a judgment declaring that the City and the mayor violated the Alabama Memorial Preservation Act, § 41-9-231 et seq., Ala. Code 1975 ("the Act").

I. Background Facts and Procedural History

The parties stipulated to the following facts:

> "1. In 1905, the Pelham Chapter of the United Daughters of the Confederacy dedicated the Confederate Soldiers and Sailors Monument ('monument') to Confederate soldiers who fought in the Civil War in Capitol Park, which has since been renamed to Charles Linn Park ('Linn Park').
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> "2. The City ... is a Class 1 municipal corporation located in Jefferson County, Alabama.
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> "3. Linn Park is owned and operated by the City ....
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> "4. The monument consists of a stone base measuring 15' x 15' with a marble shaft on top that extends 42 feet into the air.
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> "5. The stone base was laid on April 26, 1894, during the 4th Annual Convention of the Confederate Veterans, and the marble shaft was placed on the base in 1905.

[1]At the time the action was filed, William Bell was the mayor of the City, and he was named by the State as a defendant. William Bell was succeeded in office by Randall Woodfin during the pendency of this action below; pursuant to Rule 25(d)(1), Ala. R. Civ. P., Woodfin was automatically substituted as a defendant in his official capacity as the mayor of the City.

"6. On the east corner of the stone base are the words: 'In Honor of the Confederate Soldiers and Sailors.' On the north side of the stone base are the words: 'Corner Stone Laid April 26, A.D. 1894.'

"7. The marble shaft monument contains inscriptions of crossed sabers, muskets, and an anchor. Four stone artillery balls lie at the base of the monument.

"8. On one side of the marble shaft monument is an inscription that reads: 'The manner of their death was the crowning glory of their lives.' On another side there is an inscription that reads: 'To the memory of the Confederate soldiers and sailors. Erected by the Pelham Chapter, United Daughters of the Confederacy. Birmingham, Ala. April 26, 1905.'

"9. The Pelham Chapter of the United Daughters of the Confederacy dedicated the monument jointly to the State of Alabama and the City of Birmingham. Lieutenant Governor R.M. Cunningham received the monument on behalf of the State. Mayor W.M. Drennan received the monument on behalf of the City.

"10. The monument is more than 40 years old, has remained in Linn Park until the present and is owned and maintained by the City ... with no funds being provided from the State of Alabama for maintenance and upkeep.

"11. On August 15, 2017, then-Mayor William Bell ordered City employees to erect a freestanding plywood screen in the area near and around the base of the monument, which is not permanently affixed to park property and does not touch or connect to the monument. The plywood screen measures 16' x 16'9" at the base and is 12' high.

"12. The plywood screen obscures the base of the monument and the bottom of the marble shaft from view, but does not touch or connect to the monument.

"....

"15. The plywood screen currently remains around the monument without touching or connecting to the monument and the monument remains in the same location as it has since 1905."

On August 16, 2017, the State filed a declaratory-judgment action against the City and the mayor, in his official capacity (the City and the mayor are hereinafter referred to collectively as "the City defendants"). The State sought a judgment declaring that the placement of the plywood screen around the monument violated § 41-9-232(a), Ala. Code 1975, a part of the Act, that provides: "No ... monument which is located on public property and has been so situated for 40 or more years may be relocated, removed, altered, renamed, or otherwise disturbed." (Emphasis added.) Section 41-9-235(a), Ala. Code 1975, allows, among other things, entities exercising control of public property to petition the Committee on Alabama Monument Protection ("the committee"), which was created by the Act, see § 41-9-234, Ala. Code 1975, for a waiver from certain provisions of the Act. However, nothing in § 41-9-235(a) or any other part of the Act allows an entity such as the City to petition for a waiver from § 41-9-232(a), which specifically concerns monuments that have been

"so situated" on public property for 40 or more years, such as the monument in this case. Thus, because the monument in this case could not, under any circumstances, be "relocated, removed, altered, renamed, or otherwise disturbed," the State also asked the circuit court to impose upon the City defendants, pursuant to § 41-9-235(a)(2)d., Ala. Code 1975, a fine of $25,000 for each day the memorial remains "altered" or "otherwise disturbed" pursuant to the terms of the Act.

Ultimately, both the State and the City defendants moved for a summary judgment based on the stipulated facts. The State argued that the only disputed legal question in count one of its complaint was whether the City defendants' placement of the plywood screen around the base of the monument "altered" or "otherwise disturbed" the monument. As to the second count of its complaint, the State argued that the penalty provision of the Act, § 41-9-235(a)(2)d., is ambiguous but that the clear intent of the legislature was to allow a $25,000-per-day penalty to be assessed against entities that violated § 41-9-232(a). The City defendants opposed that motion and filed their own motion for a summary judgment, arguing that the plain language of both § 41-9-

232(a) and § 41-9-235(a)(2)d. support a conclusion that the City defendants did not violate the Act by placing the plywood screen around the monument and that, even if a violation occurred, there is no enforceable penalty authorized by the Act under the particular circumstances of this case. Additionally, the City defendants asserted that the Act violated the City's right to "government speech" which, they said, is protected by the First Amendment to the United States Constitution and Article 1, § 4, Ala. Const. 1901.

After both sides filed additional briefing, the circuit court conducted a hearing on the parties' pending summary-judgment motions. At the circuit court's request, the parties filed post-hearing briefs to address certain constitutional questions raised during the hearing, including whether the City possessed a right to free speech under the First Amendment to the United States Constitution and the Alabama Constitution and whether the City possessed a right to due process under the Fourteenth Amendment to the United States Constitution. The Southern Poverty Law Center sought leave from the circuit court to file a brief in support of the City

defendants as amicus curiae; no party opposed that request, and the circuit court granted the motion.

The circuit court entered an order on January 14, 2019, denying the State's summary-judgment motion and granting the City defendants' motion. The circuit court concluded that the Act impermissibly denied the City "its right to government speech" by "forcing the City to speak" a message it did not wish to convey in violation of its right to free speech. The circuit court also concluded that the Act violated the City's Fourteenth Amendment due-process rights because the Act, specifically § 41-9-235(a), failed to provide a procedure by which the City could petition the committee for a waiver that would allow it to relocate, remove, alter, rename, or otherwise disturb the monument. The circuit court concluded that § 41-9-235(a) "deprive[d] the City of its constitutionally protected speech, as well as ... its constitutional right to due process." The circuit court held that § 41-9-235(a) was unconstitutional, that it could not be severed from the Act, and that, therefore, the entirety of the Act is void.

The State moved for a stay of the circuit court's judgment pending appeal, but there is no indication that the circuit court ruled on the State's request. The State timely appealed and applied to this Court for a stay of the final judgment during the pendency of its appeal. On February 15, 2019, this Court granted the State's motion to stay and further ordered that "the accrual of any penalties under the ... Act ... is hereby stayed."

II. Standard of Review

> "An order granting or denying a summary judgment is reviewed de novo, applying the same standard as the trial court applied. American Gen. Life & Accident Ins. Co. v. Underwood, 886 So. 2d 807, 811 (Ala. 2004). In addition, '[t]his court reviews de novo a trial court's interpretation of a statute, because only a question of law is presented.' Scott Bridge Co. v. Wright, 883 So. 2d 1221, 1223 (Ala. 2003). Where, as here, the facts of a case are essentially undisputed, this Court must determine whether the trial court misapplied the law to the undisputed facts, applying a de novo standard of review. Carter v. City of Haleyville, 669 So. 2d 812, 815 (Ala. 1995). Here, in reviewing the denial of a summary judgment when the facts are undisputed, we review de novo the trial court's interpretation of statutory language and our previous caselaw on a controlling question of law."

Continental Nat'l Indem. Co. v. Fields, 926 So. 2d 1033, 1034-35 (Ala. 2005).

III. Analysis

In this case, the State sought a judgment declaring that the City defendants had violated the Act by placing a plywood screen around the base of the monument and that, therefore, pursuant to the Act, the City defendants were subject to a $25,000-per-day fine. The circuit court did not address either of those issues in its final judgment. Instead, it concluded that the City defendants could properly assert constitutional challenges to the Act as a defense to the State's action, that the Act violated the City's purported constitutional rights, and that, therefore, the City defendants were essentially excused from complying with any part of the Act because, the circuit court held, the Act was void in its entirety.

Although the circuit court did not specifically address this question, the threshold issue in this case is whether the City defendants' actions in placing a plywood screen around the base of the monument violated any part of the Act. If the City defendants' actions did not violate the Act, specifically § 41-9-232(a), then the City defendants' motion for a summary judgment was due to be granted on that basis and there was no reason for the circuit court to consider the City defendants'

constitutional challenges to the Act, which were raised merely in response to the State's motion for a summary judgment.[2] Accordingly, we will first consider the State's argument on appeal that, as a matter of law, the State was entitled to a judgment declaring that the City defendants violated § 41-9-232(a) by placing a plywood screen around the base of the monument.

A. Did the City defendants violate § 41-9-232(a)?

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[2]In Chism v. Jefferson County, 954 So. 2d 1058, 1063 (Ala. 2006), this Court held:

> "'"A court has a duty to avoid constitutional questions unless essential to the proper disposition of the case."' Lowe v. Fulford, 442 So. 2d 29, 33 (Ala. 1983) (quoting trial court's order citing Doughty v. Tarwater, 261 Ala. 263, 73 So. 2d 540 (1954); Moses v. Tarwater, 257 Ala. 361, 58 So. 2d 757 (1952); and Lee v. Macon County Bd. of Educ., 231 F. Supp. 743 (M.D. Ala. 1964)). '"Generally courts are reluctant to reach constitutional questions, and should not do so, if the merits of the case can be settled on non-constitutional grounds."' Lowe, 442 So. 2d at 33 (quoting trial court's order citing White v. U.S. Pipe & Foundry Co., 646 F.2d 203 (5th Cir. 1981)). '"No matter how much the parties may desire adjudication of important questions of constitutional law, broad considerations of the appropriate exercise of judicial power prevent[] such determinations unless actually compelled by the litigation before the court."' Lowe, 442 So. 2d at 33 (quoting trial court's order citing Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1968))."

As noted above, § 41-9-232(a) provides, in pertinent part: "No ... monument which is located on public property and has been so situated for 40 or more years may be relocated, removed, altered, renamed, or otherwise disturbed." It is undisputed that the monument meets the definition of a "monument" in the Act, see § 41-9-231(6), Ala. Code 1975; that the monument has been on public property for 40 or more years; and that the monument has not been "relocated, removed, [or] renamed." Thus, the only question to be decided is whether, based on the facts stipulated by the parties, the City defendants "altered" or "otherwise disturbed" the monument by placing a plywood screen around the base of the monument. Both sides argue that the plain language of § 41-9-232(a) requires a finding in their favor.

> "'In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature.' DeKalb County LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 275 (Ala. 1998).
>
> > "'"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is

> unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."'
>
> "Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998)(quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992))."

City of Prattville v. Corley, 892 So. 2d 845, 848 (Ala. 2003).

Neither the term "alter" nor "disturb" is defined in the Act. However, this Court regularly looks to dictionary definitions to ascertain the plain meaning of words used in a statute. See, e.g., Ex parte Christopher, 145 So. 3d 60, 64 (Ala. 2013) ("The 'plain and ordinary meaning' of statutory language may often be found in a dictionary."). The term "alter" has been defined as:

> "To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish."

Black's Law Dictionary 77 (6th ed. 1990).[3] Merriam-Webster's Collegiate Dictionary 35 (11th ed. 2003) defines "alter" as "to make different without changing into something else," and The Oxford English Dictionary defines "alter" as "[t]o make (a thing) otherwise or different in some respect; to make some change in character [or] condition ... without changing the thing itself for another; to modify, to change the appearance of." I The Oxford English Dictionary 365 (2d ed. 1989).

The term "disturb" has been defined as "[t]o throw into disorder; to move from a state of rest or regular order; to interrupt a settled state of; to throw out of course or order." Black's Law Dictionary 476 (6th ed. 1990). Merriam-Webster's Collegiate Dictionary 365 (11th ed. 2003), defines "disturb as "to interfere with," and The Oxford English

[3]The version of Black's Law Dictionary that was current when the Act was passed in 2017 does not include a definition of the terms "alter" or "disturb," but it does include a definition of the terms "alteration" and "disturbance." See Black's Law Dictionary 94 (10th ed. 2014) (defining "alteration" as: "Property. A substantial change to real estate, esp. to a structure, [usually] not involving an addition to or removal of the exterior dimensions of a building structural parts."); and Black's Law Dictionary 578 (10th ed. 2014) (defining "disturbance" as: "An act causing annoyance or disquiet, or interfering with a person's pursuit of a lawful occupation or the peace and order of neighborhood, community, or meeting.").

Dictionary defines "disturb" as "[t]o interfere with the settled course or operation of." IV The Oxford English Dictionary 872 (2d ed. 1989).

Photographs of the monument included in the record taken before and after the placement of the plywood screen confirm that the 12-foot plywood screen around the base of the monument completely blocks the view of all inscriptions on the monument. A "monument" is defined in the Act as a "statue, portrait, or marker intended at the time of dedication to be a permanent memorial to an event, a person, a group, a movement, or military service that is part of the history of the people or the geography now comprising the State of Alabama." § 41-9-231(6). Inherent in the definition of a "monument" -- indeed inherent in the very purpose of a monument -- is that a monument must memorialize something. The parties agree that the monument in this case was intended as a "permanent memorial" to a group or to military service. However, the monument in its current form -- covered by a 12-foot plywood screen around the base -- memorializes nothing. Members of the public passing through Linn Park could have no way of knowing what the marble shaft rising from behind the

plywood screen was intended to memorialize. Accordingly, although the plywood screen does not physically touch the monument, we must agree with the State that the plywood screen changes the appearance of the monument and so modifies and interferes with the monument that it must be construed as "alter[ing]" or "disturb[ing]" the monument within the plain meaning of those terms as used in § 41-9-232(a).

B. Does the City have any constitutional rights to assert against its creator state?

Having thus concluded that the City defendants' actions were in violation of § 41-9-232(a), we must now consider whether the City possesses "individual" constitutional rights to assert against the State.[4] The State maintains that a municipality has no individual, substantive constitutional rights and that the trial court erred by holding that the City has constitutional rights to free speech and due process of law.

Any discussion of this issue must begin with the well settled principle that "[m]unicipalities are but subordinate

[4]Although the mayor was also a defendant in the action below, he was sued only in his official capacity as mayor, i.e., as a representative of the City.

departments of state government." Alexander v. State ex rel. Carver, 274 Ala. 441, 443, 150 So. 2d 204, 206 (1963) (citing Ex parte Rowe, 4 Ala. App. 254, 59 So. 69 (1912)). As "mere instrumentalities of the state," municipalities possess "only such powers as may have been delegated to them by the legislature." City of Leeds v. Town of Moody, 294 Ala. 496, 501, 319 So. 2d 242, 246 (1975) (citing State ex rel. Britton v. Harris, 259 Ala. 368, 371, 67 So.2d 26, 28 (1953)). See also Winter v. Cain, 279 Ala. 481, 487, 187 So. 2d 237, 242 (1966) ("'A municipal corporation is but a creature of the State, existing under and by virtue of authority and power granted by the State.'" (quoting Hurvich v. City of Birmingham, 35 Ala. App. 341, 343, 46 So. 2d 577, 579 (1950))); and Alexander, 274 Ala. at 443, 150 So. 2d at 206 ("Counties and cities are political subdivisions of the state, each created by sovereign power in accordance with sovereign will, and each exercising such power, and only such power, as is conferred upon it by law." (citing Trailway Oil Co. v. City of Mobile, 271 Ala. 218, 122 So. 2d 757 (1960)).

The United States Supreme Court addressed the issue presented in this appeal in Williams v. Mayor & City Council

of Baltimore, 289 U.S. 36 (1933). In that case, Baltimore's mayor and city council challenged a Maryland state statute exempting certain railroad property from taxation, arguing that the statute was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court succinctly rejected this argument, holding: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." Williams, 289 U.S. at 40 (citing, among several cases, Trenton v. New Jersey, 262 U.S. 182 (1923) (holding that the city of Trenton, New Jersey, could not invoke the Due Process Clause of the Fourteenth Amendment against the State of New Jersey)). Relying on this well established general rule, the State argues that the circuit court clearly erred by holding that the City had constitutional rights or privileges to assert in opposition to the State.

Despite this clear legal authority, the circuit court concluded that the City had a "legally protected right to free speech." The circuit court based its holding on the United

States Supreme Court's decisions in Walker v. Texas Division, Sons of Confederate Veterans, Inc., 576 U.S. ___, 135 S.Ct. 2239 (2015), and Pleasant Grove City v. Summum, 555 U.S. 460 (2009), both of which concern application of the "government speech" doctrine. The circuit court relied on statements in Summum discussing the government-speech doctrine, in which the Supreme Court stated that "[a] government entity has the right to 'speak for itself'" and that it is "'entitled to say what it wishes'" and "to select the views that it wants to express." Summum, 555 U.S. at 467-68 (quoting Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000), and Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995), and citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)). The circuit court concluded that the City defendants' display of the monument in Linn Park constituted government speech, and then, relying on Gomillion v. Lightfoot, 364 U.S. 339 (1960), the court held that the State could not force the City to speak a message that it did not wish to speak. In essence, the circuit court concluded that the City's exercise of government speech also conveyed upon

the City the right to "free speech" under the First Amendment. This is a misunderstanding of the government-speech doctrine.

The government-speech doctrine recognizes that a government entity may "engag[e] in their own expressive conduct" and that "[a] government entity has the right to 'speak for itself.'" Summum, 555 U.S. at 467 (quoting Southworth, 529 U.S. at 229). However, a determination that a certain form of expression is government speech means that the "Free Speech Clause has no application." Summum, 555 U.S. at 467. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." Id. (Emphasis added.)

For example, in Summum, supra, the United States Supreme Court considered whether "the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected." 555 U.S. at 464 (emphasis added). The Court held that "the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." Id.

(emphasis added). In Walker, supra, the United States Supreme Court considered whether the "Constitution's free speech guarantees" were violated when the Texas Department of Motor Vehicles Board rejected a private group's proposed specialty license-plate design. 576 U.S. at ___, 135 S.Ct. at 2244. The Court held that "specialty license plates issued pursuant to Texas's statutory scheme convey government speech" and, therefore, that such speech "'[was] not subject to scrutiny under the Free Speech Clause." 576 U.S. at ___, 135 S.Ct. at 2246, 2247 (quoting Summum, 555 U.S. at 464). Nothing in Summum, Walker, or any authority cited by the City defendants supports the circuit court's conclusion that a government entity's ability to "speak" or to engage in expression confers on that government entity the rights and protections included in the Free Speech Clause of the First Amendment.

Likewise, the circuit court's reliance on Gomillion, supra, is misplaced. In that case, individual citizens of Tuskegee brought an action challenging the constitutionality of Local Act No. 140, which was passed by the Alabama Legislature in 1957. Act No. 140 redefined the boundaries of the City of Tuskegee so that it excluded almost every African-

American who had lived within the boundaries of the city before those boundaries were redefined. The individual citizens who had been excluded from the city's boundaries -- so that they were no longer permitted to participate in municipal elections -- brought an action seeking a judgment declaring that Act No. 140 violated the "Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution"; they also alleged that Act No. 140, if allowed to stand, would "deny them the right to vote in defiance of the Fifteenth Amendment." Gomillion, 364 U.S. at 340. The district court dismissed the action, holding that it "'[had] no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama.'" 364 U.S. at 340-41. The United States Court of Appeals for the Fifth Circuit affirmed that decision, and, on appeal before the United States Supreme Court, the State argued that its power to "establish, destroy, or reorganize by contraction or expansion its political subdivisions" was unrestricted, even by the United States Constitution. 364 U.S. at 342. Although the Supreme Court

"recognize[d] the breadth and importance of this aspect of the State's power," id., the Court rejected that argument as a misconception of the "reach and rule" of decisions such as Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), which contained sweeping statements concerning the state's "supremacy" over its municipal corporations. See, e.g., Hunter, 207 U.S. at 178-79 (in discussing the state's power over its municipalities, the Court stated: "The state, ... at its pleasure, may modify or withdraw all such powers [conferred upon municipal corporations], may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.").

The Supreme Court then stated that cases involving a state's power over its municipalities should be viewed with special attention to the particular context of those cases:

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.
>
> "....
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> "... [T]he Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution."

Gomillion, 364 U.S. at 343–45.

The circuit court, focusing on this language from Gomillion, held that the State was impermissibly attempting to assert its power over the City to force the City to speak a message, through the monument, that the City did not wish to speak. However, the ultimate holding in Gomillion was that

legislative power over municipalities, "extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a State from passing any law which deprives a citizen of his vote because of his race." Gomillion, 364 U.S. at 345 (emphasis added). Thus, Gomillion stands for nothing more, as far as it concerns the present case, than the uncontroversial conclusion that a state's extensive power and control over its municipalities, through its legislature, does not extend so far as to permit the invasion of an individual citizen's rights under the United States Constitution. Unlike the present case, the plaintiffs in Gomillion were individual citizens and there was no question that those plaintiffs had individual rights under the United States Constitution.

Gomillion simply does not address the question presented in this case: Whether a municipality possesses any "individual" constitutional rights that it may assert against its creator state. Although certain parts of Gomillion, taken out of context, appear to support the circuit court's general conclusion that a state's power to control its municipalities is limited by the United States Constitution, Gomillion itself

instructs that such "generalizations" must be considered in context of the decision as a whole in light of the "concrete situations that gave rise to them." 364 U.S. at 344. Considering the Gomillion decision as a whole, it does not provide any support for the circuit court's conclusion that a municipality itself possesses any individual constitutional rights that it may assert against the state.

We recognize that the United States Supreme Court has held that "First Amendment protection extends to corporations," Citizens United v. Federal Election Comm'n, 558 U.S. 310, 342 (2010) (citing, among numerous authorities, First National Bank of Boston v. Bellotti, 435 U.S. 765, 778, n.14 (1978)), and that the City is a municipal corporation. However, the Supreme Court, in Ysursa v. Pocatello Education Ass'n, 555 U.S. 353 (2009), rejected the idea that municipalities may be analogized to private corporations for free-speech purposes. In Ysursa, Idaho enacted a statute that permitted public employees to authorize payroll deductions for general union dues but prohibited payroll deductions for union political activities. A group of unions representing Idaho public employees challenged the limitation, arguing that it

"violated their First Amendment rights when applied to county, municipal, school district, and other local public employers." 555 U.S. at 355. The Court initially noted that the First Amendment prohibits the government from abridging the freedom of speech, but "it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression." Id. The Court then stated:

> "Idaho's law does not restrict political speech, but rather declines to promote that speech by allowing public employee checkoffs for political activities. Such a decision is reasonable in light of the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity. That interest extends to government at the local as well as state level, and nothing in the First Amendment prevents a State from determining that its political subdivisions may not provide payroll deductions for political activities."

555 U.S. at 355.

In concluding that the ban was valid at the local level, the Ysursa Court rejected the unions' argument that the State of Idaho was "obstructing speech in the local governments' payroll systems." 555 U.S. at 362. The Court noted that "State political subdivisions are 'merely ... department[s] of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit.'" Id. (quoting Trenton

v. New Jersey, 262 U.S. at 187). Then, in distinguishing a privately owned electric utility from a political subdivision of the state, the Court stated:

> "A private corporation enjoys constitutional protections, see First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 778, n. 14 (1978), but a political subdivision, 'created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.' Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933); see Trenton v. New Jersey, supra, at 185 ...."

Ysursa, 555 U.S. at 363.

Thus, the Supreme Court has firmly, and recently, rejected any notion that a subdivision of the state has any "'privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'" Id. (quoting Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933)).

Although the above analysis addresses the circuit court's conclusion that the City has a right to free speech under the First Amendment, the same general rule from Williams applies to the circuit court's conclusion that the City has a legally protected right to due process under the Fourteenth Amendment to the United States Constitution. In support of this

conclusion, the circuit court relied on Gomillion. But, as discussed above, Gomillion simply did not speak to the question whether a municipality, or any other subordinate political subdivision of the state, has "individual" rights under the United States Constitution that it could assert against its creator state. Further, Gomillion itself instructs that earlier decisions discussing a state's power over its municipalities should be construed as holding only that "the State's authority is unrestrained [as against its political subdivisions] by the particular prohibitions of the Constitution considered in those cases." 364 U.S. at 344. The Supreme Court in Trenton, supra, held that the city could not bring a claim under the Due Process Clause of the Fourteenth Amendment. See Trenton, 262 U.S. at 188. Thus, even under the broadest reading of Gomillion, we must conclude that the Supreme Court has rejected the City's claim to any right in relation to its creator state to due process of law under the Fourteenth Amendment.

In their appellate brief to this Court, the City defendants cite several decisions from the United States Supreme Court that, they say, support a conclusion that the

Supreme Court has at least implicitly held that a political subdivision of the state may bring an equal-protection claim against its creator state.[5] See Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982)(local school district initiated suit against the State of Washington challenging the constitutionality of a state law; the United States and several community organizations intervened in support of the school district, and the Supreme Court held that the state law violated the Equal Protection Clause of the Fourteenth Amendment); Romer v. Evans, 517 U.S. 620 (1996) (in an action initiated by certain individuals and municipalities challenging the constitutionality of a state law, the Supreme Court held that the state law violated the Equal Protection Clause of the Fourteenth Amendment); and Papasan v. Allain, 478 U.S. 265 (1986) (holding that a claim brought by local school officials and school children who challenged a state law as violating the Equal Protection Clause was not barred by the Eleventh Amendment but ultimately remanding that claim to

[5]Although the circuit court did not conclude that the City had any right to equal protection under the laws as provided in the Equal Protection Clause of the Fourteenth Amendment, the City defendants asserted below and on appeal that the Act violates the City's rights to equal protection under the law.

a lower court for further proceedings). However, those cases are distinguishable from the present case because in Washington, Romer, and Papasan at least one plaintiff asserting a constitutional right to equal protection under the laws was an individual citizen and, therefore, there were without question individual constitutional rights at stake. As the City defendants acknowledge, those cases did not discuss whether any of the political subdivisions involved in the cases had any "individual" constitutional rights that could be asserted against their creator states, nor did the decisions include any discussion of the general rule set forth in Williams -- which specifically held that a municipality could not assert an equal-protection claim against its creator state -- or any discussion of Gomillion. Accordingly, those cases lend no support to the City defendants' position.

Equally unavailing to the City defendants' position are cases in which the Supreme Court and United States Courts of Appeals have addressed a claim brought by a political subdivision of the state, such as a municipality, against its creator state, alleging that a federal law preempted a state statute under the Supremacy Clause. See, e.g., Nixon v.

Missouri Mun. League, 541 U.S. 125 (2004) (considering a municipality's challenge to a state statute under the Supremacy Clause); and Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979) (holding that a political subdivision has standing to bring a Supremacy Clause claim challenging a state law when the subdivision claims to be the beneficiary of a federal law that allegedly conflicts with the state law).[6] A conclusion that a municipality may enforce, through the Supremacy Clause, a federal statute that confers rights upon the municipality is clearly not a holding that a municipality possesses substantive rights and privileges under the United States

[6]Although some courts have addressed the question whether a subdivision of the state may sue its creator state as an issue of "standing," see, e.g., Rogers, supra, and City of Hugo v. Nichols, 656 F.3d 1251 (10th Cir. 2011), at least some of the courts that do so have recognized that "there is serious reason to doubt whether 'standing' in the Article III context is at issue in the Trenton and Williams line of cases." Nichols, 656 F.3d at 1255 n.4. Notably, Professors Wright, Miller, and Cooper have stated that the question whether a subdivision of a state may sue its creator state concerns the subdivision's substantive rights under the Constitution: "Political subdivisions generally are held to lack constitutional rights against the creating state. At times this conclusion is expressed as a lack of standing, although it would be better left to disposition as a matter of substantive constitutional law." 13B Charles A. Wright et al., Federal Practice and Procedure § 3531.11.1, Government Standing - States (3d ed. 2008).

Constitution -- such as the right to freedom of speech, due process of law, and equal protection under the laws -- that it may assert against its creator state -- especially in light of the general rule set forth in Williams. See City of Hugo v. Nichols, 656 F.3d 1251, 1256, 1257 (10th Cir. 2011) (noting that, consistent with Trenton and Williams, a "'municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights,'" but recognizing that a claim brought pursuant to the Supremacy Clause was allowable when "the source of substantive rights [is] a federal statute directed at protecting political subdivisions, and the Supremacy Clause was invoked merely to guarantee, as a structural matter, that federal law predominates over conflicting state law" (quoting Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 628 (10th Cir. 1998))). Those decisions do not acknowledge, in any way, the existence of a substantive constitutional right that a municipality may assert against its creator state. See Nichols, 656 F.3d at 1257-58 (holding that a city could not bring a claim against its parent state "[b]ecause the claims at issue ... are based

on a substantive provision of the Constitution and because the Supreme Court has made clear that the Constitution does not contemplate the rights of political subdivisions as against their parent states").

To the extent the City defendants argue that the City has an independent right to free speech protected by the Alabama Constitution, we disagree. As we noted above, the City is merely a "political subdivision of the state," and having been created "by sovereign power in accordance with sovereign will" as expressed by the legislature, the City may exercise "such power, and only such power, as is conferred upon it by law." Alexander, 274 Ala. at 443, 150 So. 2d at 206 (citing Trailway Oil Co., 271 Ala. at 222, 122 So. 2d at 760). Cf. Alabama Power Co. v. Citizens of Alabama, 527 So. 2d 678, 683 (Ala. 1988) (noting that "[t]he municipality's only power to regulate utilities is the power granted to it by the Constitution or by state legislation" and that, "[t]herefore, if the city has the right to choose its utility supplier, that right must be found in the Constitution or in state legislation"). Section 4, Ala. Const. 1901, provides: "That no law shall be passed to curtail or restrain the liberty of

speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty." (Emphasis added.) Section 4 of the Alabama Constitution, like the First Amendment to the United States Constitution, "restricts government regulation of private speech"; it does not purport to regulate government speech. Summum, 555 U.S. at 467. See First Amendment, United States Constitution ("Congress shall make no law ... abridging the freedom of speech."). Any right to have the City's "government speech" fall within the protections of § 4 of the Alabama Constitution must be specifically conferred by the legislature, and the legislature has not done so. To the extent the City defendants suggest that the City has an "inherent right" to free speech, we disagree. See Alexander, supra. In asserting that the City has "inherent rights," the City defendants equate the City with an individual citizen rather than a subdivision of the State, i.e., a governmental entity.

Accordingly, for all the foregoing reasons, we conclude that the circuit court erred in concluding that the City had a right to free speech and due process of law pursuant to the

United States and Alabama Constitutions.[7] Thus, the circuit court erred in concluding that the Act "violated" those rights of the City, and, therefore, the circuit court's judgment finding the Act unconstitutional and void is due to be reversed.

C. Are the City defendants subject to the penalty provision in the Act?

In light of our conclusion that the City defendants violated § 41-9-232 by placing a plywood screen around the base of the monument and that the City cannot assert any substantive Constitutional rights against its creator state, all that remains of the State's original declaratory-judgment action is a determination of what penalty, if any, the City defendants are subject to under the Act.[8] The parties agree

[7]We also hold that the circuit court's judgment cannot be affirmed on the basis that the Act violates the City's purported right to equal protection because the City has no rights to assert against the State under the Equal Protection Clause of the Fourteenth Amendment.

[8]Although the circuit court did not address this issue in its final judgment, the State has challenged on appeal the circuit court's denial of its motion for a summary judgment, which included an argument that the City defendants were subject to a penalty for violating the Act. The State raises the same argument on appeal; thus, the question whether the City defendants are subject to a penalty for violating the Act is properly before the Court. See Nationwide Mut. Fire Ins.

that the only potential source of a penalty in the Act that could be applied to the City defendants is found in § 41-9-235(a)(2)d. ("the penalty provision"), which provides, in pertinent part:

> "If the Attorney General determines that an entity exercising control of public property has ... altered ... or otherwise disturbed ... [a] monument from that public property without first obtaining a waiver from the committee as required by this article, or failed to comply with the conditions and instructions issued by the committee upon the grant of a waiver pursuant to this section, the entity shall be fined twenty-five thousand dollars ($25,000) for each violation. The fine shall be collected by the Attorney General, forwarded by his or her office to the State Treasurer, and deposited into the Alabama State Historic Preservation Fund created in Section 41-9-255."

(Emphasis added.)

Two aspects of the penalty provision are at issue in this case. First, the parties disagree as to the meaning of the phrase "without first obtaining a waiver from the committee as

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Co. v. David Grp., Inc., [Ms. 1170588, May 24, 2019] ___ So. 3d ___, ___ (Ala. 2019) ("'An "appeal from a pretrial final judgment disposing of all claims in the case ... entitles [the appellant], for purposes of our review, to raise issues based upon the trial court's adverse rulings, including the denial of [the appellant's] summary-judgment motions."'" (quoting Barney v. Bell, 172 So. 3d 849, 856 (Ala. Civ. App. 2014), quoting in turn Lloyd Noland Found., Inc. v. City of Fairfield Healthcare Auth., 837 So. 2d 253, 263 (Ala. 2002))).

required by this article." As explained above, § 41-9-235(a) provides a procedure in which "entit[ies] exercising control of public property on which ... [a] monument is located may petition the committee for a waiver" from certain provisions of the Act. For example, § 41-9-235(a) would allow an entity, such as the City, to petition for a waiver so that it did not have to comply with § 41-9-232(b), Ala. Code 1975, which generally prohibits the City defendants from relocating, removing, altering, renaming, or otherwise disturbing a "monument which is located on public property and has been so situated for at least 20 years, and less than 40 years." In other words, the City defendants can ask the committee for a waiver that would allow the City defendants to relocate, remove, alter, rename, or otherwise disturb a monument that has been "so situated" for more than 20 but less than 40 years. However, § 41-9-235(a) does not allow the City defendants to seek a waiver of § 41-9-232(a) to allow the City defendants to relocate, remove, alter, rename, or otherwise disturb a monument that has been "so situated" for 40 or more years.

The City defendants argue that, because the penalty provision references only entities exercising control of public property that have altered or disturbed a monument "without first obtaining a waiver from the committee as required by [the Act]," the implication is that the penalty will be assessed only against entities that had the option of seeking a waiver but failed to do so before violating the Act. Thus, the City defendants contend, because they had no option to seek from the committee a waiver of § 41-9-232(a) -- the part of the Act the City defendants violated -- the penalty provision does not apply to their violation of the Act. The State argues that the fact that the waiver process was unavailable to the City defendants under the circumstances of this case does not mean that they are not subject to a penalty under the penalty provision of the Act. We agree with the State.

> "When interpreting a statute, a court must first give effect to the intent of the legislature. BP Exploration & Oil, Inc. v. Hopkins, 678 So. 2d 1052 (Ala. 1996).
>
> > "'The fundamental rule of statutory construction is that this Court is to ascertain and effectuate the legislative intent as expressed in the statute. League of Women Voters v. Renfro, 292 Ala. 128,

> 290 So. 2d 167 (1974). In this ascertainment, we must look to the entire Act instead of isolated phrases or clauses; Opinion of the Justices, 264 Ala. 176, 85 So. 2d 391 (1956).'
>
> "Darks Dairy, Inc. v. Alabama Dairy Comm'n, 367 So. 2d 1378, 1380 (Ala. 1979) (emphasis added). To discern the legislative intent, the Court must first look to the language of the statute. If, giving the statutory language its plain and ordinary meaning, we conclude that the language is unambiguous, there is no room for judicial construction. Ex parte Waddail, 827 So. 2d 789, 794 (Ala. 2001). If a literal construction would produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute, such a construction is to be avoided. Ex parte Meeks, 682 So. 2d 423 (Ala. 1996)."

City of Bessemer v. McClain, 957 So. 2d 1061, 1074–75 (Ala. 2006).

The penalty provision of the Act applies to the City defendants if they "altered ... or otherwise disturbed ... [a] monument from [the City's] public property without first obtaining a waiver from the committee as required by [the Act]." Although the penalty provision is not a model of clarity, the intent of the legislature is plain from the language used in the penalty provision. Considering the Act as a whole, as we must, the Act sets forth a set of general rules that provides limitations on a public entity's ability

to relocate, remove, alter, rename, or otherwise disturb certain types of memorials. See generally § 41-9-232(a)-(c), Ala. Code 1975. The only way to be excepted from these generally applicable limitations is to obtain a waiver from the committee, pursuant to § 41-9-235(a) ("the waiver provision"). The plain language of the penalty provision seeks to punish any public entity that violates one of the general limitations provisions in § 41-9-232 without first obtaining a waiver to do so. The phrase "as required by [the Act]" simply recognizes that the waiver provision is the only possible way a public entity may be excepted from complying with the generally applicable limitations set forth in the Act. Nothing in the plain language of the penalty provision indicates that the legislature intended to punish only those public entities that could have obtained a waiver of the limitations set forth in § 41-9-232 but did not do so before they violated the Act; instead, it is clear that the penalty provision was intended to punish any entity that violated the generally applicable limitations set forth in the Act without first obtaining a waiver to do so. Accordingly, we conclude

that the City defendants, by violating § 41-9-232(a), are subject to the penalty provision of the Act.

The second part of the penalty provision at issue in this case is the part that provides for a $25,000 fine "for each violation." The State contends that this part of the penalty provision is ambiguous because it does not clearly indicate whether the legislature intended "only the initial act of erecting the plywood screen [as the sole] 'violation' within the meaning of the Act, or whether each day the public is prevented from viewing the expressive content of the monument [should be counted as] a separate violation." State's brief, at 47. Even assuming that this part of the penalty provision is ambiguous, i.e., the meaning of the plain language is uncertain, we must conclude that the penalty provision authorizes only a single $25,000 fine for the City defendants' violation of the Act. This Court has held that civil statutes that allow the assessment of a civil penalty, such as a fine, for a violation of a statute are penal in nature and, therefore, subject to the well established general rule "that penal statutes are to be strictly construed in favor of the persons sought to be subjected to their operation." State ex

rel. Graddick v. Jebsen S. (U.K.) Ltd., 377 So. 2d 940, 942 (Ala. 1979) (citing Schenher v. State, 38 Ala. App. 573, 90 So. 2d 234 (1956)). Strictly construing the phrase "for each violation" in favor of the City defendants, we must conclude that the Act authorizes only a single $25,000 fine for the City defendants' actions in this case and not a $25,000 fine for each day that the City defendants remain in violation of the Act.

If the legislature intended to penalize the City defendants for each day they remained in violation of the Act it could have specifically so provided, as it has done in numerous other civil statutes that are penal in nature. See, e.g., § 22-22A-5(18)c., Ala. Code 1975 (limiting "[a]ny civil penalty assessed" to "$25,000.00 for each violation" and specifically providing that "[e]ach day such violation continues shall constitute a separate violation" (emphasis added)); § 32-18-8, Ala. Code 1975 (authorizing a city to enforce a particular ordinance by a fine not exceeding $100, or imprisonment not exceeding six months, and specifically providing that "[e]ach day's violation of such ordinance shall constitute a separate offense"); § 28-4-70, Ala. Code 1975

(providing that keeping or maintaining an unlawful drinking place is punishable by a fine and "shall be deemed a separate offense for each day that it continues"); and § 45-37-170(b), Ala. Code 1975 (Local Laws, Jefferson County) (making certain actions related to the accumulation of garbage unlawful and providing that "[e]ach day such condition is maintained shall constitute a separate offense"). Accordingly, we conclude that, under the circumstances of this case, the City defendants were subject to a single $25,000 fine for their violation of the Act.

IV. Conclusion

The State sued the City defendants seeking a judgment declaring that the City defendants violated § 41-9-232(a) of the Act and were, therefore, subject to a penalty under the Act. The circuit court entered a summary judgment in favor of the City defendants, holding that the Act was unconstitutional because it violated the City's purported rights under the First and Fourteenth Amendments to the United States Constitution and it was thus void in its entirety. For the reasons set forth herein, that judgment is reversed, and this case is remanded with instructions to the circuit court to

enter an order declaring that the City defendants' actions constitute a violation of § 41-9-232(a) of the Act and imposing a fine on the City defendants in the amount of $25,000.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Shaw, Wise, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Bolin, J., concurs specially.

BOLIN, Justice (concurring specially.)

The main opinion correctly observes that "[t]his Court has held that civil statutes that allow the assessment of a civil penalty, such as a fine, for a violation of a statute are penal" and that the legislature intended the imposition of the fine to punish public entities that violated §41-9-232(a)-(c), Ala. Code 1975.

> "Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual [or entity], the nature of law, and the relation between law and the social order. 'As a moral or political issue [the punishment of offenders] provokes intemperate emotions, deeply conflicting interests, and intractable disagreements.' D. Garland, Punishment and Modern Society 1 (1990). The efficacy of any [punishment] cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature. See Gore v. United States, 357 U.S. 386, 393, 78 S.Ct. 1280, 1285, 2 L.Ed.2d 1405 (1958)('Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, ... these are peculiarly questions of legislative policy')."

Harmelin v. Michigan, 501 U.S. 957, 998–99 (1991)(Kennedy, J., concurring in part and concurring in the judgment).

The purpose of the fine set forth in § 41-9-235(a)(2)d., Ala. Code 1975, is to deter a public entity from relocating,

removing altering, renaming or otherwise disturbing an "architecturally significant building, memorial building, memorial street, or monument which is located on public property." § 41-9-232(a), Ala. Code 1975. I question whether a fine in the total amount of $25,000 discourages such conduct by a public entity, and I encourage the legislature to revisit § 41-9-235(a)(2)d., Ala. Code 1975, to consider the adequacy of the amount of the fine to deter a violation of § 41-9-232(a), Ala. Code 1975. A single fine in this amount for an intentional violation of the statute, after over two years of litigation, seems to be a minute deterrence for the same or similar future conduct. Indeed, the deterrent effect of a fine derives from its pinch on the purse. Williams v. Illinois, 399 U.S. 235, 265 (1970)(Harlan, J., concurring specially).