IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

AMANDA KONDRAT'YEV,
ANDREIY KONDRAT'YEV,'
ANDRE RYLAND, and
DAVID SUHOR,

Plaintiffs,

v. CASE NO.: 3:16cv195-RV/CJK

CITY OF PENSACOLA, FLORIDA,
ASHTON HAYWARD, in his
official capacity as Mayor of
the City of Pensacola, and
BRIAN COOPER, in his
official capacity as Director of
the City of Pensacola Parks &
Recreation Department,

Defendants.

_____/

DEFENDANTS' UNOPPOSED MOTION FOR STAY PENDING APPEAL OR STAY PENDING LEASE OR SALE

Defendants, City of Pensacola, Ashton Hayward, as Mayor of the City, and Brian Cooper, as Director of the City Parks & Recreation Department (collectively the "City"), pursuant to Fed. R. Civ. P. 62(a), Fed. R. App. P. 8, and 11th Cir. R. 8-1, move this Court for a stay of its Order rendered June 19, 2017 **[Doc. 41]**, pending the City's appeal of that Order. Plaintiffs do not oppose this motion.

If this Court is not inclined to grant this unopposed motion for stay pending appeal, the City respectfully moves for a temporary administrative stay of the Order pending resolution by the Court of Appeals of a stay motion to that court pursuant to Fed. R. App. P. 8(a)(2). If this Court enters a temporary administrative stay but denies a stay pending appeal, the City will promptly inform this Court of any Court of Appeals decision regarding a stay pending appeal.

In view of the short time before the City is required to take steps to comply with this Court's order, the deadline for which is July 19, 2017, the City respectfully requests that this Court exercise its discretion pursuant to Local Rule 7.1(E) to shorten the time for Plaintiffs to file a responsive memorandum to the instant motion. The City intends to file a timely notice of appeal pursuant to Fed. R. App. P. 4(a)(1)(A).

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(B) undersigned counsel has consulted with counsel for the Plaintiffs who has authorized undersigned counsel to advise the Court that Plaintiffs do not oppose the motion for stay pending appeal.

MEMORANDUM IN SUPPORT OF MOTION FOR STAY

By its Order rendered June 19, 2017 **[Doc. 41]**, this Court ordered a mandatory injunction directing the City to remove the Bayview Cross within 30 days. The City respectfully disagrees with the Court's ruling and believes that this

case is controlled by *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) and *Van Orden v. Perry*, 545 U.S. 677 (2005), which counsel in favor of upholding the Bayview Cross. As this Court clearly concluded, the Establishment Clause jurisprudence is in a state of chaos. The City intends to seek review in the Eleventh Circuit Court of Appeals, and, if necessary, the Supreme Court, seeking clarification of the Establishment Clause jurisprudence.

This Court has suggested that under the current state of the law both this Court and the Eleventh Circuit must apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *ACLU of Ga. v. Rabun Cnty. Chamber of Commerce*, 698 F. 2d 1098 (11th Cir. 1983). The City suggests that *Rabun* has been implicitly overruled and that *Lemon* does not apply under the facts in this case. If the City is correct, the City has a substantial likelihood of this case ultimately being addressed and favorably decided by either the Eleventh Circuit or the Supreme Court.

The likelihood of success notwithstanding, the issue presented in this case is a serious legal issue in need of ultimate resolution by the Supreme Court and the balance of harms tips decidedly in the City's favor to stay enforcement of this Court's Order. Granting a stay will maintain the *status quo* that has existed for more than 70 years since the original cross was erected, without harm to Plaintiffs. Other courts presented with the same question have repeatedly held that

monuments challenged under the Establishment Clause should remain in place pending appellate review. *See, e.g.*:

- *San Diegans For Mt. Soledad Nat. War Memorial v. Paulson*, 548 U.S. 1301, 1303 (2006) (Kennedy, J., in chambers) (granting a stay because "the equities here support preserving the status quo while the city's appeal proceeds," rather than "altering the memorial and removing the cross");

- *Books v. City of Elkhart*, 239 F.3d 826, 829 (7th Cir. 2006) (Ripple, J., in chambers) (granting a stay because "the public interest is best served by affording the City a full opportunity to seek review in the Supreme Court of the United States before its officials" are required to remove a Ten Commandments monument);

- *Glassroth v. Moore*, 242 F. Supp. 2d 1068, 1069–70 (M.D. Ala. 2002) (granting a stay because "the plaintiffs', as well as the public's, main goal of the vindication of the First Amendment through the expeditious and orderly removal of the monument would be better furthered by expeditious appellate review of the case on its merits");

- *Am. Civ. Liberties Union of Fla. v. Dixie Cnty., Fla.*, No. 1:07-cv-00018-MP-GRJ (N.D. Fla. Aug. 15, 2011) (granting a stay of removal of Ten Commandments monument because "staying injunctions pending appeal is particularly appropriate where, as here, doing so would preserve the status quo").

Accordingly, the City respectfully requests that this Court grant a stay pending appeal.

STANDARD FOR STAY PENDING APPEAL

Rule 62(c) of the Federal Rules of Civil Procedure provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction." In the Eleventh Circuit, four factors are considered before granting

a stay pending appeal: (1) the likelihood of prevailing on the merits of the appeal; (2) irreparable injury unless the stay is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest. *In re Cohen*, 975 F. 2d 1488, 1492 (11th Cir. 1992). "An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." *Ruiz v. Estelle*, 650 F. 2d 555, 565 (5th Cir. 1981, *cert. denied*, 460 U.S. 1042 (1983).[1]

Binding authority in the Eleventh Circuit counsels in favor of granting the stay under the facts in this case. In *Ruiz v. Estelle*, the court adopted the view of the District of Columbia Circuit in *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977), which stated in part:

> The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors.

See also U.S. v. Hamilton, 963 F. 2d 322, 323 (11th Cir. 1992) (citing *Ruiz* with approval and noting that this standard is "well-settled").

[1] Decisions of the Fifth Circuit Court of Appeals handed down prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (*en banc*).

The court in *Ruiz* found the reasoning in *Holiday Tours* persuasive and held "that on motions for stay pending appeal the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and how the balance of the equities weighs heavily in favor of granting the stay." 650 F. 2d at 565; *c.f., Hilton v. Braunskill*, 481 U.S. 770, 778 (1987) (in a habeas case, citing *Ruiz* and stating that where the movant cannot demonstrate a strong likelihood of success on appeal, "it can nonetheless demonstrate a substantial case on the merits . . . if the second and fourth factors in the traditional stay analysis militate against release" so that a stay is proper). "If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue." *Ruiz*, 650 F. 2d at 565.

Likelihood of Prevailing on the Merits

In this case, the Court must not only look at the likelihood of the City prevailing in the Eleventh Circuit but it must also look at the likelihood of the Supreme Court taking jurisdiction even if the Eleventh Circuit affirms this Court's Order. In this Court's words, the "hodgepodge" of Establishment Clause tests that have been advanced by the Supreme Court "has caused significant confusion in the

lower courts" about whether and when *Lemon* applies. **[Doc. 41 p. 9]** Justices of the Supreme Court, particularly in more recent years, have strongly criticized *Lemon* and suggested that the Court's Establishment Clause jurisprudence is in serious need of clarification. In addition, there are serious doubts about whether the Plaintiffs' even have standing to maintain this lawsuit.

Eleventh Circuit Review

Reasonable people can differ regarding interpretation of the law. The City respectfully contends that this Court's very well-reasoned Order was incorrect in its conclusion that *Lemon v. Kurtzman, supra,* and *ACLU of Ga. v. Rabun Cnty. Chamber of Commerce, supra,* are binding precedent on this Court. Rather, under the specific facts in this case, the City believes *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) and *Van Orden v. Perry*, 545 U.S. 677 (2005), should apply.

As this Court recognized, Justice Breyer's concurring opinion in *Van Orden* is the "controlling" opinion in that case. Justice Breyer said it would be better to use "legal judgment" instead of *Lemon* in "difficult borderline" Establishment Clause Cases. **[Doc. 41 p. 17]** This case, like *Van Orden,* is a borderline case. This Court recognized that Justice Breyer found *Van Orden* a borderline case because:

> (1) the "physical setting" where it was placed (i.e., it was situated in a large park with *dozens* of non-religious

> monuments and historical markers, which "suggests little or nothing of the sacred"); (2) the length of time it stood there (about 40 years); and (3) the fact that the group that donated it sought to "highlight the Commandments' role in shaping civil morality as part of that organization's efforts to combat juvenile delinquency."

[Doc. 41 pp. 17-18]

In this case the following facts establish that it, too, is a borderline case:

- (1) Although there are not "dozens" of monuments in Bayview Park, the monuments that are in the park, including the cross, have specific significance to Pensacola's history in general and Bayview Park's history in particular. The importance of the monument is as much historical as it is religious. Further, simply because the history has religious roots does not make it any less a part of history.

  - The monument to the memory of Tim Bonifay honors the Bonifay family whose roots in Pensacola date back to the late 1700s. The Bonifay family was instrumental in promotion of early Bayou Texar ski tournaments, ski shows and recreational skiing along the Bayview Park shoreline that drew hundreds, if not thousands, of people to the park. **[Doc. 30 pp. 6-7]**

  - The site of the disputed cross is the site of the first Easter sunrise service held in the park and sponsored by the Jaycees in 1941. The Jaycees not only held Easter sunrise services there every year until 2011, when the Pensacola chapter dissolved but they also held "remembrance services on Veteran's Day and Memorial Day." **[*Id*. at pp. 11 and Doc. 30-3 p. 2].** Thousands of Pensacola residents attended these services.

  - The bandstand in front of the cross is dedicated to the memory of Frazier Phelps, who originated the sunrise service event and chaired the first sunrise service. A plaque memorializing the dedication is located adjacent to the cross and bandstand. The plaque states: "Dedicated to C. Frasier Phelps – Oct. 15, 1907-Dec. 30, 1950 – Pres. Jr. Chamber of Commerce 1942 – Chm. of Easter Sunrise Com. 1941 – He lived for others – Sponsored-Donated Junior Chamber of Commerce 4-17-1949."

[Doc. 30 p. 12] The plaque leaves no doubt about who sponsored the cross and the bandstand—a civic organization, not the City.

- (2) The initial cross was erected in 1941 (76 years ago). The current cross replaced the original cross in 1969 (48 years ago). **[Doc. 30 p. 11]**

- (3) The original cross was donated by the National Youth Association. The current cross was donated by the Pensacola Jaycees. **[Doc. 30 p. 11]** Both organizations were civic organizations whose primary purpose was to encourage in its members "a spirit of genuine Americanism and civic interest." Both organizations did much to improve and contribute to the Pensacola community. **[*Id*. at p. 9]** The NYA and the Jaycees were active in Pensacola from 1922 until 2011. **[Doc. 30-3 p. 2]**

- There is a dual significance to the Bayview Cross. Yes, the Bayview Cross is recognized as a religious symbol. However, the cross is also part of the history of Bayview Park and the history of Pensacola. The Establishment Clause does not require the eradication of history simply because that history is religious. The cross also is part of the history of the Jaycees and their dedication to service for others as stated on the plaque adjacent to the cross and amphitheater. Is the history of Pensacola and its residents any less important than our Nation's history that the courts have found support the constitutionality of prayer and the display of the Ten Commandments?

- The City did not pay for, sponsor, or erect either the 1941 cross or the 1969 cross.

- The City provides minimal maintenance on the cross similar in kind to maintenance provided on all structures in its parks. *See Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) (cost of maintaining crèche was *de minims*). If the City allowed this structure to deteriorate simply because it is religious, that would be evidence of hostility towards religion forbidden by the Constitution.

- Anyone is permitted to use the area around the cross. In fact, one of the Plaintiffs in this case reserved the cross area on Easter Sunday in 2016.

- The record establishes that the only complaints the City has received in the 76-year history of the cross are the complaints from the four Plaintiffs in this

> case, two of whom have moved to Canada and one who has used the cross for his own purposes. The final Plaintiff alleges only that he feels "offended" and "excluded" by the sight of the cross.[2] **[Doc. 31-18 p. 68]**

The fact that the cross is a religious symbol is not determinative of whether this is a borderline case. The Establishment Clause was never intended to "oblige government to avoid any public acknowledgement of religion's role in society," *Salazar v. Buono*, 559 U.S. 700, 719 (2010), nor was it intended to provide a vehicle for "a relentless and all-pervasive attempt to exclude religion from every aspect of public life" which "could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992). All of the surrounding

[2] Justice Scalia has eloquently put such allegations in perspective:

> Some there are—many, perhaps—who are offended by public displays of religion. Religion, they believe, is a personal matter; if it must be given external manifestation, that should not occur in public places where others may be offended. I can understand that attitude: It parallels my own toward the playing in public of rock music or Stravinsky. And I too am especially annoyed when the intrusion upon my inner peace occurs while I am part of a captive audience, as on a municipal bus or in the waiting room of a public agency.
>
> My own aversion cannot be imposed by law because of the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989); *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975). Certain of this Court's cases, however, have allowed the aversion to religious displays to be enforced directly through the First Amendment, at least in public facilities and with respect to public ceremonies—this despite the fact that the First Amendment explicitly favors religion and is, so to speak, agnostic about music.

Elmbrook Sch. Dist. v. Doe, 134 S. Ct. 2283, 2283 (2014) (J. Scalia with whom J. Thomas joined, dissenting from the denial of certiorari).

facts and circumstances must be considered to determine whether the offense alleged in this case rises to the level of an Establishment Clause violation.

As this Court recognized, "*Van Orden* expressly establishes an 'exception' to the *Lemon* test in certain 'borderline cases' regarding the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context." **[Doc. 41 p. 18** (quoting *Trunk v. City of San Diego*, 629 F. 3d 1099, 1107 (9th Cir. 2011))**]**[3] The Bayview Cross, while not surrounded by numerous non-religious monuments, is likewise not surrounded by anything that would create a religious context. It is at the edge of a park in front of an amphitheater with a plaque recognizing the civic organization that donated the cross and the amphitheater. Respectfully, the City suggests that the Bayview Cross does not have a single significance. Rather, it has both a religious and an historical significance to Pensacola in general and to Bayview Park in particular.

This Court suggests, "It is not 'reasonable to assume' that the Eleventh Circuit would be the first" to apply *Van Orden* to a cross case. **[Doc. 41 p. 19]** Respectfully, the City disagrees. If, however, the Eleventh Circuit decides, as this

[3] *Compare McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005), which was not a borderline case where the Ten Commandments were *new* displays in two courthouses, to which there was immediate objection; the displays were placed by executives of two counties, not a civic organization; and the legislative bodies enacted resolutions acknowledging Christ as the "Prince of Ethics" and that the "Founding Father[s] [had an] explicit understanding of the duty of elected officials to publicly acknowledge God as the source of America's strength and direction," which resolutions were posted along with the Ten Commandments. *Id*. at 853.

Court did, that it is bound by its *Rabun* decision, there is a likelihood the Supreme Court will decide to hear the case. *See discussion below*.

As discussed above, the City "need only present a substantial case on the merits when a serious legal question is involved and how the balance of the equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F. 2d at 565. This Court recognized the serious legal question involved in this case: "As one author has noted, '[i]n a rare and remarkable way, the Supreme Court's establishment clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment doctrine is seriously, perhaps distinctively, defective.' *** Count me among those who hope the Supreme Court will one day revisit and reconsider its Establishment Clause jurisprudence . . . ." **[Doc. 41 p. 22]** The City intends to present that opportunity to the Supreme Court.

As this Court suggested, three of the four Plaintiffs lack serious standing to continue this lawsuit. **[Doc. 41 n.1]** The final Plaintiff's standing is borderline under current Establishment Clause jurisprudence. *See ACLU v. Rabun Cnty. Chamber of Commerce*, 698 F. 2d at 1108 (held that both a regular camper in Georgia state parks and the operator of a summer camp whose land looked onto the park in question had standing to challenge the maintaining of a large cross on state park land); *Ala. Freethought Ass'n v. Moore*, 893 F. Supp. 1522, (N.D. Ala. 1995)

(noting that in 11th Circuit cases plaintiffs have "standing because their regular course of business (or pleasure, as was in part the case in *Rabun County*), repeatedly subjected them to the allegedly unconstitutional conduct"). *See also ACLU v. Dixie Cnty.*, 570 F. Supp. 2d 1378, 1382 (N.D. Fla. 2008) ("It is enough for the purposes of the injury-in-fact requirement, that a plaintiff allege that in the pursuit of his regular affairs he is exposed to the challenged activity.").[4] *But compare Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."); *Van Orden v. Perry*, 545 U.S. at 694 (J. Thomas concurring) ("There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing

[4] After the district court denied the County's motion for summary judgment on standing, the ACLU filed a motion for summary judgment on the merits. The district court granted the ACLU's motion. *ACLU of Fla., Inc. v. Dixie Cnty. FL*, 797 F. Supp. 2d 1280 (2011). The County appealed. *ACLU of FL, Inc. v. Dixie Cnty.*, 690 F. 3d 1244 (11th Cir. 2012). The 11th Circuit found that the district court's decision regarding standing was proper initially because there was a conflict regarding a fact essential to the standing determination—the deposition asserted there were "other things" that offended Doe at the courthouse and contributed to his disinclination to pursue a property search; however, the affidavit averred that the monument alone was the but-for cause. *Id*. at 1248-49. But "error emerged when the district court implicitly ratified its finding of standing—a finding resolved on a summary judgment posture and based on the content of the affidavit alone [without considering the conflicting deposition testimony]—by failing to address standing again prior to or during its final ruling in the case." *Id*. at 1249. Thus, the 11th Circuit remanded the case for an evidentiary hearing to resolve the factual dispute regarding standing.

the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path involves no coercion and thus does not violate the Establishment Clause."); *Glasssroth v. Moore*, 335 F. 3d 1282, 1293 (11th Cir. 2003) (specifically declining to address whether a third plaintiff who had not altered his behavior as a result of the monument had standing because two plaintiffs had altered their behavior).

Arguably, Mr. Ryland's standing could fall on either side of the constitutional line based on the facts in this case. Thus, whether the Eleventh Circuit agrees with this Court or the City with respect to the merits of the claim, the Eleventh Circuit may address the standing issue it left unanswered in *Glassroth v. Moore* and quash the summary judgment finding none of the Plaintiffs in this case have standing.

Assuming under the current state of the law Mr. Ryland's standing would survive, that standing would be eviscerated if the Supreme Court clarifies that mere "offense" does not equate to coercion or an establishment of religion in violation of the Establishment Clause. The Supreme Court has yet to directly address "standing" in a monument case. It has, however, addressed "offense" in the context of an Establishment Clause violation. As Justice Thomas explained in his

concurring opinion in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1837 (2014), "[t]o the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt," *id*., by those who prefer to wipe out any reference to religion. In a dissent from a denial of a writ of certiorari in a later case, Justice Scalia and Justice Thomas explained: "*Town of Greece* made categorically clear that mere '[o]ffense . . . does not equate to coercion' in any manner relevant to the proper Establishment Clause analysis." *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283 (2014) ("Were there any question before, *Town of Greece* made obvious that [offense] is insufficient to state an Establishment Clause violation.").

Supreme Court Review

As this Court recognized, "*Lemon* has been widely criticized (and sometimes savaged) by scholars, courts, and individual Supreme Court Justices." **[Doc. 41 p. 7]** *Lemon* has not been consistently used and several other tests have been applied instead; and at times "the Justices have advocated no discernible formal test at all (but rather a standardless ad hoc approach)." **[*Id*. at pp. 9]**

At least five current Supreme Court Justices have criticized *Lemon* and/or declared that the standard for Establishment Clause analysis is in need of clarification—Justices Roberts, Kennedy, Thomas, Alito, and Gorsuch.

- Chief Justice John Roberts – *Salazar v. Buono*, 130 S. Ct. 1803 (2010) ("Although, for purposes of the opinion, the propriety of the 2002 injunction

[to remove the cross] may be assumed, the following discussion should not be read to suggest this Court's agreement with that judgment, some aspects of which may be questionable.").[5]

- Justice Anthony Kennedy – *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (the endorsement test "is flawed in its fundamentals and unworkable in practice").

- Justice Clarence Thomas – *Utah Highway Patrol Ass'n v. American Atheists, Inc.*, 132 S. Ct. 12, 21-22 (2011) ("[O]ur Establishment Clause precedents remain impenetrable, and the lower courts' decisions . . . remain incapable of coherent explanation.").

- Justice Samuel Alito – *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2535 (2012) ("This court's Establishment Clause jurisprudence is undoubtedly in need of clarity.").

- Justice Neil Gorsuch – *Am. Atheists, Inc. v. Davenport*, 637 F. 3d 1095, 1110 (10th Cir. 2010) (Gorsuch dissenting) ("But whether even the true reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear. A majority of the

[5] As Deputy Solicitor General, John Roberts participated in writing a merits brief in *Bd. of Edu. v. Mergens*, 496 U.S. 226 (1990) and an *amicus* brief in *Lee v. Weisman*, 505 U.S. 577 (1992). [*See* https://www.justice.gov/sites/default/files/osg/briefs/1989/01/01/sg890427.txt and ps://www.justice.gov/sites/default/files/osg/briefs/1990/01/01/sg900105.txt respectively.]

In *Mergens*, the issue was whether the Equal Access Act, 20 U.S.C. §§ 4071-4074, violated the Establishment Clause when construed to prohibit a high school from denying a student religious group permission to meet on the school premises during non-instructional time. In *Weisman*, the issue was whether the Establishment Clause permitted clergy to offer invocation and benediction prayers as part of a public school's official graduation ceremony.

In *Mergens*, the brief argued that the "Lemon test has generated results that often obfuscate as much as they illuminate proper action under the Establishment Clause." Brief for the U.S. at 43. The government said that "when the *Lemon* test is divorced from the context in which it was spawned [which was legislative action] . . . it sweeps within its breath a whole range of practices and traditions with ancient roots in the history and experience of the American people." *Id*.

In *Lee v. Weisman*, the brief to the Supreme Court again urged the overruling of *Lemon*. Brief for the U.S. as *Amicus Curiae*, at 4. The brief suggested that the result of applying the *Lemon* test outside of the context in which it was fashioned had "been pervasive confusion in the lower courts and persistent division" in the Supreme Court. *Id*. Furthermore, the government proposed that the *Lemon* test be replaced with a single, careful inquiry into whether the practice at issue provides direct benefits to religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences. *Id. generally*.

> Supreme Court in *Van Orden* declined to employ the reasonable observer/endorsement test in an Establishment Clause challenge to a public display including the Ten Commandments. Following the Supreme Court's cue at least three of our sister circuits seem to have rejected the test, at least when it comes to passive public displays like Utah's. And this year a plurality of the Supreme Court questioned whether even the true 'reasonable observer' framework is always appropriate for analyzing Establishment Clause questions. *See Buono*, 130 S. Ct. at 1819.").

Justice Breyer chose not to follow *Lemon* in a "monument" case which he characterized as borderline. See *Van Orden v. Perry*, 545 U.S. 677 (2005) (not applying *Lemon* and "rely[ing] less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves").

Only four of the nine Justices must vote to accept certiorari jurisdiction. *See* http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1. As noted above, five current Justices have voiced their opinions that Establishment Clause jurisprudence is in need of clarification and one Justice simply declined to apply *Lemon* in a monument case. Thus, it is likely the Supreme Court would take jurisdiction in this case.

Irreparable Injury if Stay Not Granted

The Supreme Court found irreparable harm in a strikingly similar case. There, the district court gave the city 90 days to remove "a prominent Latin cross at a veterans' memorial on city property." *San Diegans For Mt. Soledad Nat. War*

Memorial v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). "Although 'a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted,'" Justice Kennedy granted a stay in that case because "altering [a] memorial and removing [a] cross" would disrupt the status quo and cause "irreparable harm" to the city. *Id.* at 1303. The same is true here: altering the park and removing a cross that has stood for 75 years would disrupt the status quo and cause irreparable harm to the City. If the stay requested is not granted, the cost to remove the cross will be approximately $7,500.00. If the City is ultimately successful in the appeal, an additional $10,000.00 in costs would be incurred in returning the cross to its current location. *See* affidavit of Brian Cooper attached. It is unlikely that any of those costs would be recouped from the Plaintiffs and thus those expenses would be borne by the taxpayers of the City.

No Substantial Harm to Plaintiffs

Not only will there not be substantial harm to Plaintiffs if a stay is granted, but it is questionable whether there will be *any* harm to Plaintiffs from the granting of the requested stay. Two of the Plaintiffs have moved to Canada. It is undisputed that Mr. Suhor has reserved the cross in the past for his personal use. His representation that he feels offended or excluded by the presence of the cross is, at best, questionable. The remaining Plaintiff, Mr. Ryland, states that he visits "Bayview Park many times throughout the year for numerous events, including

group picnics and meetings at the Senior Center, and [he] often walk[s] the trail around the park." **[Doc. 311-18 p. 68]** The cross apparently has not deterred his use of the park. It simply offends him.

Bayview Park is comprised of 28 acres. A review of the map provided in the City's memorandum establishes that the Senior Center is at the western most edge of the park and the cross is at the eastern most edge of the park. One wishing to park at the Senior Center must enter Bayview Park from the west, never passing the cross. **[Doc. 30 p. 5]** Mr. Ryland does not allege that the events or picnics he attends are held anywhere near the cross or that he can see the cross while attending those events.

Mr. Ryland does allege that he "often" walks the trail around the park. If the outer-most trail is walked, it would take him past the cross. However, there are other trails in the park he could take so that he would not pass the cross. With 28 acres in the park and numerous trails, a slight variation in his walk should not be an inconvenience. This variation for Mr. Ryland's walk is a reasonable alternative pending appellate review and will not create any unreasonable burden for Mr. Ryland. Mr. Ryland can use the park as before with little, if any, inconvenience.

Given the heavy burden placed upon the City and the negligible burden placed upon the plaintiffs, it is likely that the Eleventh Circuit would grant at least

a temporary stay pending appeal. In such circumstances, "the plaintiffs', as well as the public's, main goal of the vindication of the First Amendment through the expeditious and orderly removal of the monument would be better furthered by expeditious appellate review of the case on its merits" than by removing the monument while the case proceeds. *Glassroth v. Moore*, 242 F. Supp. 2d 1068, 1069–70 (M.D. Ala. 2002). In *Glassroth*, the court permitted a Ten Commandments monument of recent vintage to remain in place pending review by the Eleventh Circuit. *See id.* A similar stay is even more appropriate for the longstanding cross at issue here.

No Harm to the Public Interest

The current cross has been in Bayview Park since 1969. The original cross was erected in 1941. There has been a community outcry against removing the cross. As of June 30, 2017, a petition to keep Bayview Cross had 13,305 signatures. https://www.change.org/p/ashton-hayward-save-the-bayview-cross. On June 20, 2017, City Public Information Officer Vernon Stewart wrote on his Facebook page: "We are now receiving messages from tourists from all over threatening to boycott Pensacola as a vacation spot if we take the cross down." Other than the "offense" alleged by the four Plaintiffs, there was no evidence of any discontent about the Bayview Cross (whether it be the former wooden cross or

the current cross) for the more than 70 years the cross has been located in Bayview Park.

In a similar situation involving a Ten Commandments monument, the Seventh Circuit granted a stay pending a petition for certiorari because "the public interest is best served by affording the City a full opportunity to seek review in the Supreme Court of the United States before its officials devote attention to formulating and implementing a remedy," and in formulating that remedy, the City "has the right and, indeed, the obligation to take into consideration the religious sensibilities of its people and to accommodate that aspect of its citizens' lives in any way that does not offend the strictures of the Establishment Clause." *Books v. City of Elkhart*, 239 F.3d 826, 829 (7th Cir. 2001). The City of Pensacola should likewise be afforded the opportunity to seek meaningful review and accommodate its citizens.

There is clearly no harm to the public interest in the granting of the requested stay and, in fact, the overwhelming public interest favors maintaining the cross.

CONCLUSION

The first complaint about the cross in over 70 years came from one of the Plaintiffs in this lawsuit shortly before the lawsuit was filed. Mr. Suhor complained, but then reserved the cross for his own purpose. Two of the other

Plaintiffs now live in Canada. As noted above, the remaining Plaintiff does not even allege he has altered his behavior as a result of the cross. Under these circumstances the balance certainly tips in favor of maintaining the *status quo* to protect the historically significant cross and the public's interest pending review or sale/lease of the area around the cross. The City respectfully requests that this Court grant the requested stay.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of June, 2017, the foregoing *Defendants' Motion for Stay Pending Appeal or Stay Pending Lease or Sale* was filed with the Clerk of the Court via the CM/ECF Filing System, which will send a notice of electronic filing to:

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