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

AMANDA KONDRAT'YEV, et al.,

Plaintiffs,

v. Case No.: 3:16cv195-RV/CJK

CITY OF PENSACOLA, FLORIDA, et al.,

Defendants.
_____/

ORDER

The plaintiffs brought this civil action against the City of Pensacola, and others, challenging the constitutionality of the "Bayview Cross" under the First Amendment's Establishment Clause. The parties filed motions for summary judgment, and I entered an order addressing those motions on June 19, 2017 (doc. 41).

I began my 23-page order by recognizing that the Bayview Cross—which was donated by a private organization and costs the City very little to maintain—is part of the rich history of Pensacola. Order at 2. Indeed, a cross has stood in a remote corner of Bayview Park ever since April 1941, and it has been the site of innumerable events attended by tens of thousands of people over those 76 years, apparently without any incident. *Id.* at 1-2. Nevertheless, four individuals—two of whom currently reside in Canada—were offended by it and filed this lawsuit to have it removed. *Id.* at 2 & n.1.

I then proceeded to discuss the history and purpose of the Establishment Clause. *Id.* at 3-6. I speculated that the Founding Fathers, while having carefully drafted the First Amendment to ensure separation of church and state, "would have most likely found this lawsuit absurd." *Id.* at 6. I went on to state that I personally agreed with that

assessment. *Id.* However, my personal views do not control. Rather, I am bound by Supreme Court precedent—namely, *Lemon v. Kurtzman*, 403 U.S. 602 (1971)—even though (as I wrote) that precedent is "historically unmoored, confusing, inconsistent, and almost universally criticized by both scholars and judges alike." *Id.* at 3; *see also, e.g., Glassroth v. Moore*, 335 F.3d 1282, 1302 n.6 (11th Cir. 2003) ("all . . . federal courts are bound to follow decisions of the United States Supreme Court"); *United States v. Hough*, 803 F.3d 1181, 1197 (11th Cir. 2015) ("We are bound to follow [binding] precedent even if we disagree with it, but we are not bound to remain silent about whether it is wrong.") (Carnes, Ed., J., concurring).

Notably, lower courts are bound to follow Supreme Court precedent even when it appears that the Supreme Court may be willing to overrule that precedent. *See, e.g., Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Citing each of the foregoing opinions, the Eleventh Circuit has expressly stated: "We take those admonitions seriously." *Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008) (collecting additional cases); *see also Evans v. Secretary Fl. Dep't of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012) ("We must not, to borrow Judge Hand's felicitous words, 'embrace the exhilarating opportunity of anticipating' the overruling of a Supreme Court decision.") (internal citation omitted) (collecting additional cases).

It is for these reasons that I have reluctantly followed the law as set out by the Supreme Court in *Lemon* and Eleventh Circuit precedent, *ACLU of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) (applying *Lemon* on virtually identical facts). However, I concluded my order with an invitation for the Supreme Court to revisit and reconsider its Establishment Clause jurisprudence. *See* Order at 22. Apparently taking the first step to that end, the City has filed a motion to stay my judgment pending an appeal to "the Eleventh Circuit Court of Appeals, and, if necessary, the Supreme Court" (doc. 43). The plaintiffs do not oppose this motion.

A court will consider four general factors before granting a stay pending appeal: (1) whether the movant has made a "strong showing" that it is likely to succeed on the merits; (2) whether the movant will be "irreparably injured" absent a stay; (3) whether issuance of the stay will "substantially injure" other parties interested in the case; and (4) where the "public interest" lies. *See Nken v. Holder*, 556 U.S. 418, 425-26 (2009). Although the first factor (strong showing of success on appeal) is ordinarily "the most important," a stay can be "granted upon a lesser showing of a 'substantial case on the merits' when the balance of the equities identified in factors 2, 3, and 4 weighs heavily in favor of granting the stay." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (some quotation marks and brackets omitted). Indeed, binding precedent in our circuit has specifically "emphasized" that granting a stay that maintains the status quo pending appeal "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 [stay] would inflict irreparable injury on the movant." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (quotation omitted).

I conclude—and by not opposing the City's motion the plaintiffs presumably agree—that these factors weigh in favor of granting a stay. *See, e.g., San Diegans for Mt. Soledad Nat. War Memorial v. Paulson*, 548 U.S. 1301, 1303 (2006) (Kennedy,

J., in chambers) (granting the stay of a lower court judgment ordering the removal of a "prominent Latin cross" on city property; concluding that "altering the memorial and removing the cross" would disrupt the status quo and cause "irreparable harm" to the city pending appeal). Thus, for all the reasons the City has articulated in its unopposed motion to stay (doc. 43), that motion is hereby GRANTED. My order of June 19th will be STAYED, subject to (and effective as of) the filing of the anticipated appeal.

The plaintiffs' motion for attorney's fees (doc. 42) is also STAYED pending resolution of the appeal.

DONE and ORDERED this 3rd day of July, 2017.

/s/ Roger Vinson
ROGER VINSON
Senior United States District Judge