

**IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
 BIRMINGHAM DIVISION**

STATE OF ALABAMA EX. REL.)	
ATTORNEY GENERAL STEVE)	
MARSHALL)	
Plaintiff,)	
v.)	CASE NO.
)	CV- 17-903426-MGG
CITY OF BIRMINGHAM;)	
MAYOR RANDALL WOODFIN,)	
<i>In His Official Capacity</i>)	
)	

**DEFENDANTS’ RESPONSE IN OPPOSITION TO STATE OF
 ALABAMA’S MOTION TO STAY**

Comes Now, the City of Birmingham and Mayor Randall Woodfin, (“the Defendants”) and files the following opposition in response to the State of Alabama’s Motion to Stay this Court’s order (Doc. 86) finding that the Alabama Memorial Preservation Act of 2017, Ala Code § 41-9-230 et seq. (“the Act”) is unconstitutional:

Facts

The Defendants do not contest the factual assertions as presented in ¶ 1 – 8 of the State’s Motion to Stay. With respect to ¶ 9, the Defendants acknowledge that they have been served with the State’s Notice of Appeal but no appeal by the State of Alabama has been received at this time.

Argument

The Court must consider four factors to determine whether the State has made a sufficient showing for this court to grant a stay pending appeal. These factors are (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Coastal States Gas Corporation v. Department of Energy*, 609 F.2d 736, 737 (5th Cir. 1979); *Fortune v. Molpus*, 431 F.2d 799, 804 (5th Cir. 1970); *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir. 1968). Here, the Court’s judgment should not be stayed pending appeal because the State of Alabama cannot establish these four factors.

The grant of a motion to stay the trial court's mandate is an *exceptional response* granted only on a showing of “a probable likelihood of success on the merits on appeal,” *United States v. Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992); *Garcia–Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir.1986) (*quoting Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.1981), cert. denied, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983)). It is a widely held view that a stay can never be granted unless the movant has shown that success on appeal is probable. A finding that the movant demonstrates a probable likelihood of success on the merits on appeal requires that

we determine that the trial court below was clearly erroneous. *Garci-Mir v. Meese*, 781 F.2d 1450, 1453(11th Cir. 1986); *In re Grand Jury Proceedings*, 689 F.2d 1351, 1353 (11th Cir.1982). This Court based its judgment on sound and prevailing caselaw demonstrating fault with the Alabama Memorial Preservation Act on multiple grounds, rejecting the State's arguments to the contrary.

This Court analyzed the Supreme Court's finding in *Pleasant Grove City v. Sumnum*, that "permanent monuments displayed on public property typically represent government speech" on behalf of that city and that citizens cannot force a city to propound speech or ideas with which it does not agree. 555 U.S. 460, 467 (2009). Despite the fact the monument is owned and maintained by the City, the Act, provides no process or procedure for the City to seek relief from honoring a sentiment of which it disagrees. (Doc. 86, Order at p. 4). This Court relied on established precedent from this nation's highest court, holding that a city has a right to speak for itself and select the views it wants to express. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998). This line of cases simply cannot be ignored, as the State would suggest, in favor of a proposition that the trial court's judgment is clearly erroneous because the State's power is unassailable and unrestricted.

This Court's judgment was not only based on federally protected rights, but also relied on the State of Alabama's well established principles of statutory interpretation and the lack of a severability clause in the Act. The language of the Act indisputably provides a waiver process applicable only to schools and to structures that are more than twenty but less than forty years old. Ala. Code § 41-9-235. This provision is so clearly intertwined in the Act, that a Court is incapable of severing the objectionable portion, therefore voiding the Act in its entirety. *State v. Lupo*, 984 So.2d 395 (Ala. 2007). As such, on appeal, the Alabama Supreme Court is likely to reach the same conclusion and declare the Alabama Memorial Preservation Act unconstitutional. The State's arguments on summary judgment were unpersuasive in overcoming this obstacle and therefore unlikely to prevail on appeal.

Even if the Act itself was declared enforceable, the State would still lose on the merits because they cannot establish that the actions for which they filed suit against the City violated the Act. It was the State that initiated this action on their unsupported assertion that by partially obscuring the confederate memorial from full view, the City "altered" or "otherwise disturbed" the monument in a manner

contemplated by the legislature. There is no precedent in this State that favors this conclusion and we believe the Alabama Supreme Court will agree.¹

The State next argues that this action should be stayed because “if” the Court’s judgment leads the City or others to believe it is legal to alter or destroy monuments before the Supreme Court of Alabama has the opportunity to address this case, the State may suffer irreparable harm from the destruction or alteration of historical monuments and buildings. The City contends, however, that the present and immediate harm that the City and other municipalities would suffer far outweighs the mere possibility that confederate monuments within the State may be removed. At issue in this case are the fundamental rights of a municipal government to represent the interests of its citizenry. There is, perhaps, no injury more substantial and less reparable than improper denial of the right to liberty. *Garcia-Mir v. Meese*, 781 F.2d 1450, 1455 (11th Cir. 1986). Comparatively, the only harm that the State would suffer is the inability to enforce a restriction that is less than two years old. Moreover, the State has not mentioned or presented any evidence that any other city or municipality has indicated a desire to take action against any confederate monument. In *Winter v. Natural Resources Defense Council*, the United States Supreme Court made clear that the showing of a *possibility* of irreparable harm is

¹ Adherents to this view maintain that a lesser showing, of, say, a chance of prevailing that is only fifty percent or less is insufficient . . .” *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977).

not sufficient; the party seeking an injunction or stay must demonstrate the likelihood of irreparable harm and a likelihood of prevailing on the merits. 129 S.Ct. 365, 375 (2008). The City has taken no action or made any representation that would suggest the likelihood of the monument's removal while the appeal is pending – and that should be sufficient.

The City however must stand in opposition to the stay because the State also argues that this action is in the public's interest and would not cause substantial harm to the City. The City adamantly disputes this claim. Not only do the citizens of the City of Birmingham continue to suffer the indignity of the monument and the negative message it projects, the State's assessment of alleged penalties would continue to accumulate at a rate of \$25, 000 per/day until the enforceability were determined. This clearly weighs heavily against the City's interest. There is justice in proclaiming the Act void and it should continue to be considered void and unenforceable pending the resolution of appeal. At a minimum, the City is due to have protective measures established by the Court that would bar the State's claim for penalties while the appeal is pending.

The City of Birmingham contends that the State has failed to demonstrate the requisite standards to support the exceptional remedy of entering a stay. Accordingly, the City respectfully asks that this Court deny the State's Motion for a Stay of this Court's Order on Cross Motions for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019 I electronically filed the foregoing with the Clerk of the Court using the AlaFile System which will send notification of such filing to the following:

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