STATE OF MICHIGAN

IN THE COURT OF APPEALS

ANN DAWSON, JEFF GRUNOW, ET AL.,

Plaintiffs-Appellants,

Court of Appeals
Docket No. 329154

v.

CITY OF GRAND HAVEN, a municipal entity of The State of Michigan,

Defendant-Appellee.

Ottawa County Circuit Court
Case No. 15-4224-CZ
Hon. Jon H. Hulsing

BRIEF FOR AMICUS CURIAE AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

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INTEREST OF THE AMICUS CURIAE

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C., that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or amicus curiae in many of the leading church-state cases decided by the United States Supreme Court, the federal Courts of Appeals, and state appellate courts. Americans United represents more than 125,000 members and supporters across the country, including thousands in Michigan.

As part of its commitment to ensuring that the state remains neutral on questions of religion, Americans United represented residents of the City of Grand Haven and nearby towns who objected to the governmental favoritism of Christianity conveyed by the Dewey Hill cross. Americans United asked the City to either stop displaying the cross or allow the residents to erect their own displays on Dewey Hill (whether freestanding or affixed to the pole that hosts the cross). The City decided to end displays of the cross and denied the requests to erect alternative displays. We submit this brief to explain that the City's decision was well within the bounds of constitutional law and that the City would violate the U.S. Constitution if it resumes displaying the cross.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the past fifty years a permanent monument has been affixed to the crown of Dewey Hill, a sand dune owned by the City of Grand Haven that overlooks the City's waterfront area, which is a popular spot for holiday and recreational events. Although the monument is usually retracted and lying flat on the ground, by use of a lifting mechanism the City can raise the monument to display either a cross or an anchor, an act that the City often performed on its own initiative for holidays and special events. The City also regularly raised the cross on Sundays during the summer, for worship services that a church conducts on the waterfront. On January 5, 2015, the City of Grand Haven passed Resolution 15-013, which ended the City's practice of raising the monument as a cross. The resolution requires the monument to be configured solely as an anchor and allows the City to continue to raise the monument in that configuration. It also permits private individuals to pay to have the anchor raised for community activities.

Plaintiffs, most of whom are members of the church that conducts the waterfront services, now contend that the City has violated their free-speech and equal-protection rights under the Michigan Constitution by no longer raising the monument in the form of a cross for those services. Plaintiffs are mistaken. The City of Grand Haven preapproved the symbols on the Dewey Hill monument; owns, maintains, and operates the monument; and continues to exercise control over what symbol the monument displays today. Thus, the City speaks through the fixture, just as governmental entities have spoken through the erection of permanent monuments for centuries. As government speech, the retractable monument and its use are not governed by the Free Speech Clause of the Michigan Constitution. Nor is the Dewey Hill monument a limited public forum, where viewpoint discrimination would be forbidden. Grand Haven has demonstrated none of the intent necessary to open the monument up to private

speakers, and the monument itself is unsuitable to serve as a limited public forum, being able to display only two messages. Additionally, even if the Dewey Hill monument had been a limited public forum in the past—which it was not—the City of Grand Haven was under no obligation to keep the forum open, and exercised its lawful authority when it closed the forum.

Finally, even if the Court were to determine that the City "discriminated" against religious speech in a manner that triggers strict scrutiny, the City's decision to end displays of the cross would satisfy that test. The City's displays of the cross violated the Establishment Clause of the U.S. Constitution's First Amendment, and complying with that Clause is a compelling governmental interest. The Latin cross is the preeminent symbol of Christianity. The City prominently displayed the cross, nearly alone (accompanied only by an American flag), on a landmark and beloved piece of public property. And the City actively raised the cross, including for church services. Displays of the cross thus conveyed an unmistakable message of City endorsement of Christianity.

This Court should uphold the trial court's dismissal of Plaintiffs' claims.

ARGUMENT

I. The City of Grand Haven acted within its lawful authority when it declined to display a cross on Dewey Hill.

A. The Dewey Hill monument is government speech.

The First Amendment "restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v Summum*, 555 US 460, 467; 129 S Ct 1125; 172 L Ed 2d 853 (2009).[1] Hence, a governmental entity can both "select the views that it

[1] As "[t]he United States and Michigan Constitutions provide the same protections of the freedom of speech," this Court "may consider federal authority when interpreting the extent of Michigan's protections of free speech." *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 256; 833 NW2d 331 (2013).

wants to express," *id.* at 468 (citations omitted), and "speak[] through the . . . removal of speech that [it] disapproves," *Mech v Palm Beach Co Sch Bd*, 806 F3d 1070, 1074 (CA 11, 2015) (internal quotation marks omitted), without triggering constitutional concerns. This power is integral to the government's ability to function. Otherwise, the government could never explain its public policies without simultaneously including the viewpoints of the policies' opponents. See *Walker v Texas Div, Sons of Confederate Veterans, Inc*, __ US __, __; 135 S Ct 2239, 2246; 192 L Ed 2d 274 (2015) ("How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?").

To determine whether an object such as the Dewey Hill monument constitutes government speech, courts must examine three factors: the history of the type of object in question, a reasonable observer's impression of the object, and whether the government has maintained control over the messages on the object or in the space that the object occupies. *Id*. at 2247. The Supreme Court applied these factors to donated monuments on public land in *Summum*, 555 US at 470-72. In that case, a municipal park contained fifteen monuments, at least eleven of which had been donated by private parties. *Id*. at 464. One of those displays was a statue of the Ten Commandments. *Id*. at 465. A minority religious organization, Summum, sought to have its own Seven Aphorisms monument permanently displayed in the park as well, but the city denied the request. *Id*. at 465-66. Summum responded by filing suit, arguing that the city had engaged in unconstitutional viewpoint discrimination by accepting the Ten Commandments display but not Summum's. *Id*. at 466.

The Supreme Court disagreed. The Court explained that both publicly funded and privately donated monuments have historically been used by governments to broadcast

governmental messages; that reasonable observers would conclude that the government would not allow a permanent fixture on its property unless it agreed with the fixture's message; and that the municipality had retained control over selection of which monuments would be placed in the park. *Id*. at 470-72. The Court therefore concluded that "the placement of a permanent monument in a public park is best viewed as a form of government speech," and that such placement decisions are "not subject to scrutiny under the Free Speech Clause." *Id*. at 464.

The same analysis applies here. The Dewey Hill monument is a "[p]ermanent monument displayed on public property," and *Summum*'s three factors demonstrate that this fixture is government speech as well. *Id*. at 470.

First, the Dewey Hill monument is part of a long history of public monuments that have been commissioned and donated by private parties for the government's benefit. *Id*. at 470-71. Donated public monuments include "the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial," as well as "thousands" of monuments now displayed by cities and states. *Id*. at 471. These donated monuments "long have communicated messages" from the governmental entities that accepted them, *Walker*, 135 S Ct at 2248, in the same way that governments, "[s]ince ancient times," have "used monuments to speak to the public," *Summum*, 555 US at 470. The Dewey Hill monument continues this tradition: it was apparently designed and commissioned by private individuals but accepted by the City and placed on public property. See Complaint ¶¶ 11-12;[2] Transcript of Proceedings, August 10, 2015, at 24.

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[2] This case comes before this Court on a motion for summary disposition under MCR 2.116(C)(9). Therefore, solely for purposes of this brief, all well-pleaded factual allegations in Plaintiffs' complaint are presumed to be true. See *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 425-26; 648 NW2d 205 (2002). Amicus does not concede that all those allegations are actually true.

Second, a reasonable observer viewing the Dewey Hill monument would believe that the fixture communicates City messages. It is "not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated," and that holds true for the government as well. *Summum*, 555 US at 471. Observers of donated monuments therefore "routinely—and reasonably—interpret them as conveying some message on the property owner's behalf." *Id*. A reasonable observer of the Dewey Hill monument, who would know that Dewey Hill is an ecologically delicate habitat and that no other fixtures may be placed on it, Complaint ¶¶ 9, 17, would reasonably conclude that the City decided to install the monument because it embraced the monument's messages.

Finally, the City of Grand Haven has maintained control over what messages appear on Dewey Hill. When determining whether to accept a donated monument, governmental decision-makers "exercise[] selectivity," "select[ing] the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture." *Summum*, 555 US at 471-72. By weeding out messages that it does not wish to convey, the government transforms a privately commissioned and donated object—which may previously have been the speech of the private party—into the government's own speech. To date, Grand Haven has not allowed any permanent fixture other than the monument and the American flag to be placed on Dewey Hill. Complaint ¶ 17. In fact, when individuals represented by Amicus recently sought leave to place additional objects on Dewey Hill or on the monument itself, the City denied the request. *Id*. ¶¶ 14, 17. The monument has thus been uniquely selected by the City of Grand Haven to adorn Dewey Hill in a space where the City maintains control over symbolism.

The Supreme Court has stated that "[p]ermanent monuments displayed on public property typically represent government speech," *Summum*, 555 US at 470, and the Dewey Hill monument is no different. It is one of the many donated monuments around the country that are "meant to convey and have the effect of conveying a government message" and thereby "constitute government speech." *Id*. at 472; see also *Freedom from Religion Foundation, Inc v City of Warren*, 707 F3d 686, 696 (CA 6, 2013) (holiday display in municipality's civic center was government speech because city "reserved final approval of all components of the display to itself" and "erected, maintained, took down and stored the display each year and covered the costs in doing so"); *American Atheists, Inc v Davenport*, 637 F3d 1095, 1114-16 (CA 10, 2010) (privately owned memorial crosses on public land were government speech because of their location and their inscriptions, which included state highway patrol's official insignia); *Wells v City of Denver*, 257 F3d 1132, 1141-43 (CA 10, 2001) (holiday sign and display in municipal building was government speech because city had "complete control over the sign's construction, message, and placement"; "the City built, paid for, and erected the sign"; "the City bears the ultimate responsibility for the content of the display"; and "an informed, objectively reasonable observer" viewing sign and display would recognize government as the speaker); *Downs v Los Angeles Unified Sch Dist*, 228 F3d 1003, 1011 (CA 9, 2000) (holding that public-school authorities could prevent teacher from posting statements contrary to school policy on school bulletin boards because all "postings were subject to the oversight of the school principals," a policy that made bulletin boards' contents government speech).

Plaintiffs contend, however, that the Dewey Hill monument, unique among donated monuments on public land, somehow escapes being government speech. They argue that, because Grand Haven previously raised the cross fixture for private church services in exchange

for a fee,[3] the City has "*facilitated* private religious speech" through the monument, which it cannot now stop doing without a compelling governmental interest. Appellants' Brief at 10.

Plaintiffs are wrong. That the City previously raised the cross for private church services in no way renders the cross private speech. The Supreme Court held that the specialty license plates in *Walker* were government speech even though they were displayed by private citizens on private vehicles for their own purposes: "[w]e have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs," that "a vehicle is 'readily associated with its operator,'" and that "drivers displaying license plates 'use their private property as a mobile billboard for the State's ideological message.'" 135 S Ct at 2252-53 (quoting *Wooley v Maynard*, 430 US 705, 715, 717 n 15; 97 S Ct 1428; 51 L Ed 2d 752 (1977)). The Court explained that "[t]he fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider." *Walker*, 135 S Ct at 2251. Consistent with this reasoning, the court in *Trunk v City of San Diego*, 629 F3d 1099, 1119 (CA 9, 2011), treated a large cross on public property as government speech notwithstanding that the cross was erected by a private organization that regularly used it for religious services on Easter and other occasions.

[3] In their complaint, Plaintiffs merely alleged that "[t]he Church rents the City Waterfront Bleachers" for summer Sunday church services "and the Cross is erected as part of the service." Complaint ¶ 13. The complaint does not allege that the rental fee for the "Waterfront Bleachers" covered raising the cross, and Amicus could not find anything else in the record that supports the assertion in Plaintiffs' brief (Appellants' Brief at 8, 10) that the City charged a fee to erect the cross for church services. But the City appears to accept that assertion in its brief (Appellee's Brief at 11), so Amicus will—solely for purposes of this brief—treat it as if it were accurate.

Nor does it matter that the City may, perhaps, have charged a fee to raise the cross for church services. The payment of a fee is insufficient to transform an object that would otherwise be government speech into private speech. "A government entity may exercise [its] freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Summum*, 555 US at 468. Indeed, in *Walker* the Supreme Court held that specialty license plates were government speech even though the individuals who placed the plates on their cars had to pay a fee for them. 135 S Ct at 2252. The Court explained:

> [T]he fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide governments the opportunity to profit from speech, the existence of government profit alone is insufficient to trigger forum analysis. Thus, if the city in *Summum* had established a rule that organizations wishing to donate monuments must also pay fees to assist in park maintenance, we do not believe that the result in that case would have been any different. Here, too, we think it sufficiently clear that Texas is speaking through its specialty license plate designs, such that the existence of annual fees does not convince us that the specialty plates are a nonpublic forum.

Id. (citation omitted).

The fees Grand Haven's private citizens allegedly paid to the City for hoisting the cross are analogous to the license-plate fees in *Walker* and to the hypothetical *Summum* fee described above. *Walker* made clear that objects that are deemed government speech under the *Summum* factors cannot be transformed into private speech simply because private persons who like the government speech voluntarily pay a fee in order to further broadcast that speech. Likewise, the payment of a fee by Grand Haven's residents does not transform the Dewey Hill monument, which is government speech under the *Summum* factors, into private speech.

Plaintiffs could bring a cross to the waterfront or place one on a boat near the waterfront. But that does not satisfy them: They specifically want the cross on top of Dewey Hill. Appellants' Brief at 11. Their demand for the City to display this cross in this specific

location—an ecologically fragile piece of City property, where no other permanent monuments have been placed—itself suggests a desire on their part for a cross that receives Grand Haven's imprimatur. As the Supreme Court explained in *Walker*:

> [A] person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas's license plate designs convey government agreement with the message displayed.

135 S Ct at 2249. Just as in *Walker*, where the desire to have a government-created license plate reflected a preference (because of the government's imprimatur) for government speech to communicate the motorists' desired message, Plaintiffs' desire here for a cross on Dewey Hill instead of one on the waterfront or on a nearby boat shows their belief in the superiority of the monument to convey their message. But that very perception of superiority is at least in part the result of the government's preapproval and endorsement of the symbolism on Dewey Hill—actions that undoubtedly render the cross government speech. Cf. *Knights of Columbus, Council No 94 v Town of Lexington*, 272 F3d 25, 34 (CA 1, 2001) (holding that members of private organization could not place crèche on city green in order to "invoke public backing of their beliefs").

B. The Dewey Hill monument is not a limited public forum.

Plaintiffs contend that the Dewey Hill monument pole, upon which the City has previously displayed either a cross or an anchor, is a limited public forum in which the City is forbidden to discriminate based on viewpoint. Appellants' Brief at 16. Plaintiffs are incorrect. Forum analysis is used "to evaluate government restrictions on purely private speech that occurs on government property." *Walker*, 135 S Ct at 2250. When "the State is speaking on its own

behalf, the First Amendment strictures that attend the various types of government-established forums do not apply." *Id*. Because the Dewey Hill monument is government speech, forum analysis is inappropriate here.

The Supreme Court has described three different types of public forums. The traditional public forum consists of streets, parks, and other publicly owned locations that "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Ed Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45; 103 S Ct 948; 74 L Ed 2d 794 (1983). Governments can also create designated public forums when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose." *Summum*, 555 US at 469. The government is severely limited in how it may regulate traditional and designated public forums: although reasonable time, place, and manner restrictions are appropriate, the government may not engage in content discrimination without satisfying strict scrutiny—that is, any restrictions must serve a compelling state interest and be narrowly tailored. *Id*. at 469-70.

The third type of forum is a limited public forum: one that the government has created to be "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id*. at 470. Restrictions in a limited public forum must be "reasonable and viewpoint neutral." *Id*. While "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics," the government "must respect the lawful boundaries it has itself set." *Rosenberger v Rector & Visitors of Univ of Va*, 515 US 819, 829; 115 S Ct 2510; 132 L Ed 2d 700 (1995). And any restrictions on speech in a limited public forum must be "reasonable in light of the purpose

served by the forum." *Id.* (quoting *Cornelius v NAACP Legal Defense & Education Fund, Inc*, 473 US 788, 806; 105 S Ct 3439; 87 L Ed 2d 567 (1985)). Plaintiffs contend that Grand Haven created this type of forum when it accepted and installed the Dewey Hill monument. Appellants' Brief at 17.

Plaintiffs are incorrect for several reasons. Not only does application of the *Summum* factors demonstrate that the Dewey Hill monument is government speech, *see supra* Section I(A), but the City's behavior and the monument's configuration are incongruous with forum analysis.

First, the City has not evinced the necessary intent to create a limited public forum on the Dewey Hill pole. The government "does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 US at 802. To determine the government's intent, courts look at the government's "policy and practice" with respect to the potential forum, and analyze "whether [the government] intended to designate a place not traditionally open to assembly and debate as a public forum." *Id.* No such designation has occurred here.

At no point has Grand Haven opened the Dewey Hill monument pole for public discourse. Plaintiffs have pled no facts to show that, at any point in the past, private citizens could have their own messages hoisted on the monument's pole. Even to the extent that private persons may previously have been able to ask the City to raise the monument on special occasions, they were limited to two choices at most—the anchor or the cross—both of which had been previously approved by the City.[4]

[4] Plaintiffs' complaint obliquely suggests in one paragraph that the monument could also be configured in the form of a star but says nothing more about that. Complaint ¶ 8. Whether there

Plaintiffs nevertheless argue that Dewey Hill is a limited public forum "designed to facilitate two specific types of public speech, one is secular in the form of an anchor, one [is] religious in the form of a cross." Appellants' Brief at 17. But this description is not accurate. The Dewey Hill monument does not display two "types" of speech, secular and religious, because an anchor cannot represent all secular ideas any more than a cross can represent all religious ideas. It is far more accurate to state that the Dewey Hill monument displays two distinct messages—the cross and the anchor—and the ability to choose among two government-preapproved messages does not a limited forum make, certainly no more than giving individuals the option to choose among various preapproved license plates created a public forum in *Walker*. See 135 S Ct at 2250-51 (holding that specialty license plates are not a designated or limited public forum because needing individual governmental approval for each license plate's message "militates against a determination that [the State] has created a public forum").

Nor is this analysis changed by the fact that private persons may now pay a fee to have the monument raised in its anchor form or by the allegation that the City in the past charged a fee to raise the monument in its cross form. As explained above, the use of private dollars for the dissemination of messages preapproved by the government did not change the license plates in *Walker* into a limited public forum. See *id.* at 2251-52.

The Supreme Court has already described the narrow circumstances in which public participation in determining the content of a permanent monument could trigger forum analysis:

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were two or three potential configurations can make no difference to the legal analysis, however. This brief assumes that there were two configurations.

Moreover, Plaintiffs' complaint does not actually allege that, prior to the passage of Resolution 15-013, the City had ever raised the monument in the form of an anchor for a private event, or that the City was willing to do so upon request. Nor is Amicus aware of any other record evidence showing that.

> [T]here are limited circumstances in which the forum doctrine might properly be applied to a permanent monument—for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

Summum, 555 US at 480. The Dewey Hill monument, with its two preapproved message options, is a far cry from this hypothetical.

Furthermore, the Dewey Hill monument should not be deemed a limited public forum because it is physically unsuitable to serving as one. When analyzing whether government has created a limited public forum, courts must "examine[] the nature of the property and its compatibility with expressive activity," as the potential forum's suitability sheds light on the government's intentions for the property. *Cornelius*, 473 US at 802. Typically, "[t]he forum doctrine has been applied in situations in which government-owned property . . . was capable of accommodating a large number of public speakers without defeating the essential function of the land . . . ." *Summum*, 555 US at 478. Examples include "park[s] [that] can accommodate many speakers and, over time, many parades and demonstrations," *id*.; public-university student-activity funds that can support dozens of student organizations, see *Rosenberger*, 515 US at 825; and public-university buildings that can provide meeting spaces for hundreds of student groups, especially over the course of time, see *Widmar v Vincent*, 454 US 263, 274-75; 102 S Ct 269; 70 L Ed 2d 440 (1981).

The Dewey Hill monument is simply not "capable of accommodating a large number of public speakers." See *Summum*, 555 US at 478. The monument is fitted for only two messages: the cross and the anchor. Indeed, the limited options provided by the Dewey Hill monument are much more akin to—though even more restricted than—the limited space for permanent monuments in public parks. The inability of public parks to include large numbers of different

monuments—and thus different messages—was key to the Supreme Court's determination in *Summum* that forum analysis is not suitable in the context of publicly displayed permanent monuments. See 555 US at 478-79. Similarly, the Dewey Hill monument's inability to host diverse messages makes it physically unsuitable to be a limited public forum, and this Court should not treat it as one.

Plaintiffs also argue that Grand Haven had a "policy and practice" of opening the entirety of Dewey Hill as a limited public forum, for Resolution 15-013 and the minutes accompanying it explain that the City was closing Dewey Hill as a "public forum." See Appellants' Brief at 17-19; Complaint ¶ 17. But even if Dewey Hill as a whole was a limited public forum for some purposes in the past, that would not help Plaintiffs' case. Plaintiffs are not seeking to erect a new cross on Dewey Hill. Rather they are seeking to control how the City displays its existing permanent monument—a monument that, for the reasons we have explained, is government speech and no kind of public forum. Even if the City may have allowed some kinds of temporary private speech on Dewey Hill in the past, it is clear under *Summum* that permanent monuments on the dune would not thereby be transformed into private speech, for the park at issue in *Summum* was a traditional public forum required by law to be open to temporary private speech. See 555 US at 464-65, 478.

C. Even if Plaintiffs were correct and the Dewey Hill monument was a limited public forum, the City acted permissibly by closing the forum.

The Constitution does not "require[] the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 US at 799-800. Therefore, once the government has created a limited public forum, it "is not required to indefinitely retain the open character of the [forum]." *Perry*, 460 US

at 46. Even if the Dewey Hill monument was a limited public forum in the past (which it was not), or even if Dewey Hill itself was a limited public forum (which would be irrelevant even if true), Resolution 15-013 was a constitutional exercise of the City's authority to close government-created forums.

Resolution 15-013 ended any privilege that private citizens may previously have had to request that the City raise the monument in the form of a cross. Complaint ¶ 17. Now, private persons wishing to use the monument as an additional backdrop to their waterfront events have only one choice: the anchor. Even if the previous two-message option somehow rendered the monument a limited public forum, by permanently converting the monument into an anchor, Grand Haven closed the forum. The Dewey Hill monument is now a single and permanent public monument, no different from the permanent monuments in *Summum* that were deemed government speech. See 555 US at 464; Section I(A).

The decision to close any limited public forum that may have existed previously on Dewey Hill was well within the City's legitimate authority. Many cases have recognized that municipalities are under no constitutional obligation to keep open public forums that had hosted (or had been asked to host) religious displays. See *Santa Monica Nativity Scenes Comm v City of Santa Monica*, 784 F3d 1286, 1288-89 (CA 9, 2015) (upholding city ban on all winter displays in public park, even though ban ended annual nativity display); *Knights of Columbus*, 272 F3d at 30, 32 (upholding city regulation banning all unattended structures from town green, even though ban put end to crèche display that had been erected annually by private organization); *Diloreto v Downey Unified Sch Dist Bd of Ed*, 196 F3d 958, 962, 970 (CA 9, 1999) (upholding school's ban of all advertisements on baseball fence, even though ban had effect of disallowing Ten Commandments display); *Grossbaum v Indianapolis-Marion Co Bldg Auth*, 100 F3d 1287,

1290-91, 1298-99 (CA 7, 1996) (upholding city policy prohibiting all private displays from lobby of municipal building, which had result of banning menorah erected during previous holiday seasons).

II. The Establishment Clause prohibits the City from displaying the monument in the form of a cross.

Plaintiffs argue that Grand Haven's decision to stop displaying the cross on Dewey Hill constitutes content or viewpoint discrimination that is unconstitutional unless it satisfies strict-scrutiny analysis—that is, the City's conduct must be narrowly tailored to serve a compelling governmental interest. Appellants' Brief at 27. As already explained, the Dewey Hill monument is government speech, not private speech, so the City's decision to display it solely as an anchor does not trigger strict scrutiny. But even if the City's decision were subject to strict scrutiny for some reason, it is still constitutional because it serves, through narrowly tailored means, the City's compelling interest in not violating the Establishment Clause.

The Establishment Clause provides essential protections for religious minorities and nonbelievers. "Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .'" *Allegheny Co v ACLU Greater Pittsburgh Chapter*, 492 US 573, 589-90; 109 S Ct 3086; 106 L Ed 2d 472 (1989), *dicta on different issue rejected by Town of Greece v Galloway*, __ US __; 134 S Ct 1811; 188 L Ed 2d 835 (2014). These words guarantee that a religious majority cannot, thanks to its sheer number of adherents, use the mechanisms of democracy to favor one religion over others. *Id.* at 590.

Protecting religious liberty via the Establishment Clause is so crucial to our constitutional order that the Supreme Court has held: "There is no doubt that compliance with the

Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Capitol Square Review & Advisory Bd v Pinette*, 515 US 753, 761-62; 115 S Ct 2440; 132 L Ed 2d 650 (1995) (plurality opinion of SCALIA, J., joined by REHNQUIST, C.J., and KENNEDY and THOMAS, J.J.); accord *id*. at 783 (O'CONNOR, J., concurring); *Lamb's Chapel v Ctr Moriches Union Free Sch Dist*, 508 US 384, 394; 113 S Ct 2141; 124 L Ed 2d 352 (1993); *Widmar*, 454 US at 271; *Satawa v Macomb Co Rd Comm*, 689 F3d 506, 524 (CA 6, 2012). And federal appellate courts have concluded that even the constitutional prohibition against viewpoint discrimination is "subject to being trumped by the existence of a compelling state interest," "such as avoiding a seeming Establishment Clause violation." *Peck ex rel Peck v Baldwinsville Central Sch Dist*, 426 F3d 617, 633 n 11 (CA 2, 2005); accord *Cole v Oroville Union High Sch Dist*, 228 F3d 1092, 1101 (CA 9, 2000); *Good News/Good Sports Club v City of Ladue Sch Dist*, 28 F3d 1501, 1508, 1508 n 13 (CA 8, 1994); *Berger v Rensselaer Central Sch Corp*, 982 F2d 1160, 1168 (CA 7, 1993); *May v Evansville-Vanderburgh Sch Corp*, 787 F2d 1105, 1113 (CA 7, 1986); see also *C H ex rel Z H v Oliva*, 226 F3d 198, 211 (CA 3, 2000) (en banc) (ALITO, J., dissenting on other grounds) (stating in Establishment Clause case, "a public school may even restrict speech based on viewpoint if it can show a compelling interest for doing so").

Governmental bodies can violate the Establishment Clause in a number of ways, including through conduct that would lead "a reasonable observer [to] believe that a particular action constitutes an endorsement of religion by the government." *ACLU of Ohio Foundation, Inc v Ashbrook*, 375 F3d 484, 492 (CA 6, 2004); accord *ACLU of Ohio Foundation, Inc v DeWeese*, 633 F3d 424, 430-31 (CA 6, 2011). An "endorsement of religion" includes any governmental behavior toward any religion that "sends the . . . message to . . . nonadherents that

they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . ." *McCreary Co v ACLU of Ky*, 545 US 844, 860; 125 S Ct 2722; 162 L Ed 2d 729 (2005) (quoting *Santa Fe Indep Sch Dist v Doe*, 530 US 290, 309-10; 120 S Ct 2266; 147 L Ed 2d 295 (2000)). The "reasonable observer" in question is "deemed aware of the circumstances under which [the challenged] governmental actions arise, including the legislative history and implementation." *ACLU of Ky v Mercer Co*, 432 F3d 624, 636 (CA 6, 2005). Applying this standard here, a reasonable observer viewing the Latin cross on Dewey Hill would understand it to convey governmental endorsement of religion.[5]

First, a reasonable observer would be aware that the Latin cross is the "preeminent" and "exclusive[]" symbol of Christianity. *Buono v Norton*, 371 F3d 543, 545 (CA 9, 2004) (quoting *Buono v Norton*, 212 F Supp 2d 1202, 1205 (CD Cal, 2002)). Indeed, the federal courts of appeals that have decided Establishment Clause challenges to Latin crosses are unanimous in this recognition. See, e.g., *Trunk*, 629 F3d at 1110-11 (citing numerous cases); *ACLU of Ill v City of St Charles*, 794 F2d 265, 271 (CA 7, 1986).

Second, a reasonable observer would know that Dewey Hill is a government-owned sand dune occupying an important role in the Grand Haven community: it both serves as a beautiful natural backdrop to community events on the waterfront and is a fragile natural landmark that has been designated a "critical dune" under Michigan's Natural Resources and Environmental

[5] Governmental bodies can also violate the Establishment Clause, among other ways, if they act with a primarily religious purpose or excessively entangle themselves with religion. See, e.g., *DeWeese*, 633 F.3d at 430-31. Because display of the cross violates the endorsement test, and given the limited record on this appeal, it is unnecessary here to engage in the purpose or entanglement analyses.

Protection Act. Complaint ¶¶ 8, 13, 17. To protect the dune, Grand Haven has limited intrusions onto Dewey Hill and disallowed any monuments or public displays other than the cross/anchor fixture and a flagpole with the American flag. *Id.* ¶ 17. The City placed the cross in this prominent location, where it "physical[ly] dominate[s]" not only the dune but the entire waterfront area. See *Adland v Russ*, 307 F3d 471, 487 (CA 6, 2002). The prominence of a governmental display of a cross supports the conclusion that the display unconstitutionally endorses religion. See, e.g., *Trunk*, 629 F3d at 1123-24; *St Charles*, 794 F2d at 271; see also *Adland*, 307 F3d at 486-87 (relying on size and prominence of Ten Commandments display to support ruling that display violated Establishment Clause).

Third, a reasonable observer would recognize that no other displays, except for an American flag atop a pole, exist or are allowed near the monument. See Complaint ¶ 17; Appellants' Brief, Appendix C. The cross is not subsumed in a greater secular display that could dilute its religious message. Compare *Allegheny*, 492 US at 598 (crèche violated Establishment Clause because it stood alone in prominent location in municipal building), with *Lynch v Donnelly*, 465 US 668, 671-72; 104 S Ct 1355; 79 L Ed 2d 604 (1984) (upholding inclusion of crèche in holiday display that contained numerous secular objects). On the contrary, that the sole object displayed near the cross is an American flag sends a message linking the cross with the government. See *Ashbrook*, 375 F3d at 493-94 (judge's display of Ten Commandments near Bill of Rights unconstitutionally linked religion and government); *Books v City of Elkhart*, 235 F3d 292, 307 (CA 7, 2000) ("placement of the American Eagle gripping the national colors at the top of [Ten Commandments] monument . . . specifically links religion . . . and civil government"); see also *Trunk*, 629 F3d at 1125-26 (striking down cross displayed near large American flag).

Finally, a reasonable observer would be aware that the cross cannot be raised and, therefore, cannot even be seen from the ground, unless the City operates the lifting mechanism. See Complaint ¶ 9. That the City engages in active conduct to display the cross—rather than merely allowing an inert monument to stand—further accentuates the message of governmental endorsement of religion. See *St Charles*, 794 F2d at 267-68, 273 (noting that city affirmatively lit cross in finding display unconstitutional); accord *ACLU of Ga v Rabun Co Chamber of Commerce, Inc*, 698 F2d 1098, 1101, 1103, 1111 (CA 11, 1983).

Grand Haven's decision to make the preeminent symbol of Christianity the single focal point of a prominent and beloved piece of public property thus plainly violated the Establishment Clause. See, e.g., *Davenport*, 637 F3d at 1120 ("[T]here is little doubt that [a state] would violate the Establishment Clause if it allowed a private group to place a permanent unadorned twelve-foot cross on public property without any contextual or historical elements that served to secularize the message conveyed by such a display."); *St Charles*, 794 F2d at 267, 270-71 (city's placement of lighted cross at center of Christmas display violated Establishment Clause); *Rabun*, 698 F2d at 1100-01 (large lighted cross on state property violated Establishment Clause); see also *Baker v Adams Co/Ohio Valley Sch Bd*, 310 F3d 927, 929 (CA 6, 2002) (listing cases in which unaccompanied displays of Ten Commandments on governmental property were held to violate Establishment Clause).

Nor is this analysis changed by Plaintiffs' allegation that the cross was donated as a "memorial to those who served and lost their lives in the Vietnam War." Complaint ¶ 12. For a "sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion." *Trunk*, 629 F3d at 1112 (quoting *Ellis v City of La Mesa*, 990 F2d 1518, 1527 (CA 9, 1993)). By using a cross as the emblem for

a veterans' memorial, the City has communicated to reasonable observers that Grand Haven "has chosen to honor only Christian veterans." *Id.* (quoting *Separation of Church & State Comm v City of Eugene*, 93 F3d 617, 626 (CA 9, 1996) (O'SCANNLAIN, J., concurring)). Such religious favoritism is incompatible with the Establishment Clause, especially here, where the City must actively operate the cross's lifting mechanism to bring the cross into view, and no other memorials representing veterans of other faiths may be placed nearby. See *Trunk*, 629 F3d at 1102; *Davenport*, 637 F3d at 1121, 1124 (memorial crosses for state highway patrol placed on public land and bearing official highway-patrol seal violated Establishment Clause); *Buono*, 371 F3d at 548-50 (cross in national park dedicated to World War I veterans violated Establishment Clause); *Eugene*, 93 F3d at 618-19 (cross in public park that served as war memorial violated Establishment Clause); *Gonzales v Lake Co North Twp*, 4 F3d 1412, 1414-15, 1423 (CA 7, 1993) (memorial cross in public park violated Establishment Clause).

Finally, the cross would violate the Establishment Clause even if raising it at the request of a private party for a fee injected elements of private speech into the display. In *Allegheny*, the Supreme Court determined that a privately owned crèche, displayed alone in the "main" and "most beautiful part" of a municipal building, violated the Establishment Clause, even though a nearby sign disclosed that the crèche belonged to a private organization. 492 US at 598-601. The Court concluded that the "sign simply demonstrate[d] that the government is endorsing the religious message of that organization," and the Establishment Clause forbids such governmental conduct in the same manner that it forbids religious endorsement through direct government speech. *Id.* at 600; see also *Davenport*, 637 F3d at 1111-12, 1115 (crosses erected on public property to honor fallen police officers held unconstitutional even though crosses were paid for and owned by private organization, with consent of each deceased officer's family); *Buono*, 371

F3d at 548, 550 (cross was unconstitutional even though it was erected and maintained by private individuals); *Eugene*, 93 F3d at 618, 620 (same); *St Charles*, 794 F2d at 267-68 (striking down cross even though it was lit by volunteer firefighters and cost of its electricity was paid for with private contributions).

Thus, even if this Court were to determine that Grand Haven supported private speech by raising the cross at the behest of private citizens, the City was still endorsing religion when it did so. Grand Haven placed the cross on public property; it ensured that the cross fixture stood nearly alone in a prominent location, clearly visible from the Grand Haven waterfront; and it operated the mechanism that brought the cross into view every time it appeared. If anything, when the City raised the cross for church services, it communicated endorsement of those services and their religious messages.

For these reasons, the City's decision to end displays of the cross served the compelling state interest of avoiding Establishment Clause violations. Further, the City employed means narrowly tailored to achieve that interest. The City considered a number of other options and reasonably rejected them all as unworkable. Adding other monuments to Dewey Hill would have risked severe harm to the dune. See Complaint ¶ 17. The monument pole itself is not fitted to display additional messages. In any event, allowing other displays on Dewey Hill could have caused the land to "stop being a beautiful backdrop to the downtown and become a hideous billboard." *Id.* And "[s]elling Dewey Hill to resolve this issue would [have] be[en] a betrayal to future citizens," for it would have jeopardized the City's tradition of using the dune for annual city-sponsored celebrations. See *id.*

If Grand Haven had not passed Resolution 15-013 and had continued to raise the cross on Dewey Hill, the City would have continued to violate the Establishment Clause. Ending that

unconstitutional conduct was a compelling state interest, served through narrowly tailored means. Therefore, Grand Haven's actions pass strict scrutiny.

CONCLUSION

Grand Haven did not violate the Michigan Constitution when it decided that it would no longer display a cross on Dewey Hill. This Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 23rd day of December, 2015, I electronically filed the foregoing with the Clerk of the Court, using the Truefiling system, which will provide electronic service upon the following:

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