No. 16-_____

In the Supreme Court of the United States

KOICHI MERA and GAHT-US CORPORATION,

Petitioners,

–v–

CITY OF GLENDALE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM B. DECLERCQ
COUNSEL FOR PETITIONERS
DECLERCQ LAW GROUP, INC.
225 S. LAKE AVENUE, SUITE 300
PASADENA, CA 91101
(626) 408-2150
WILLIAM@DECLERCQLAW.COM

JANUARY 11, 2017

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

The city of Glendale, California has inserted itself into a geopolitical dispute where it has no local responsibility, and taking a position in conflict with the policy of the United States. In 2013, Glendale approved and installed, and continues to maintain, a permanent bronze monument in its public Central Park with a granite plaque condemning Japan and the Japanese people for their historical involvement with "Comfort Women" and "urging the Japanese Government to accept historical responsibility for these crimes." The United States federal government has not condemned Japan on this issue, has not identified any crimes by Japan in connection with this issue, and has not expressed an official policy of urging Japan to "accept historical responsibility." The monument is highly offensive to the Petitioners, members of the local Japanese-American community, and has diminished their ability to enjoy Glendale's Central Park and public services and amenities offered at the park's Senior Center.

QUESTION PRESENTED

1. Does the Constitution preempt local government expressive conduct that intrudes on the federal government's exclusive foreign affairs power?

PARTIES TO THE PROCEEDINGS

The Petitioners are KOICHI MERA and GAHT-US CORPORATION, plaintiffs and appellants below. The original lead plaintiff in this lawsuit, Michiko Shiota Gingery, passed away in 2015, during the pendency of her appeal, mooting her claims.

The Respondent is the CITY OF GLENDALE. Another defendant, City Manager Scott Ochoa, was originally named in the complaint in his official capacity as city manager of the City of Glendale, but was dismissed from the action on April 10, 2014.

CORPORATE DISCLOSURE STATEMENT

GAHT-US Corporation has no parent company; is not a public company; and no public company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioners KOICHI MERA, and GAHT-US CORPORATION, respectfully petition this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, to correct the Ninth Circuit's departure from long-standing precedent concerning the separation of powers inherent in our federal system of government, and the Constitution's express allocation of foreign affairs to the sovereign federal government. Petitioners respectfully request the Court grant the writ to clarify the standards governing preemption and to correct the Ninth Circuit's erroneous new rule narrowing the Constitution's enumerated provisions that unambiguously and without exception grant all foreign affairs powers to the federal government.

OPINION BELOW

The opinion of the district court for the Central District of California, Judge Percy Anderson, is reported at *Gingery v. City of Glendale*, No. CV 14-1291 PA (AJWX), 2014 WL 10987395 (C.D. Cal. Aug. 4, 2014). The opinion of the Ninth Circuit panel is reported at *Gingery v. City of Glendale*, 831 F.3d 1222 (9th Cir. 2016). A petition for reconsideration *en banc* was denied on October 13, 2016, and the writ of mandate issued on October 24, 2016.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

- U.S. Constitution, Article I, Section 8

  The Congress shall have Power To . . . provide for the common Defense . . . To establish an uniform Rule of Naturalization . . . To . . . regulate the Value . . . of foreign Coin . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies . . . and repel Invasions . . .

- United States Constitution, Article II, Section 2.

  The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

  The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by

and with the Advice and Consent of the Senate, shall appoint Ambassadors . . .

- **U.S. Constitution, Article III, Section 2**

  The judicial Power of the United States shall extend to all cases . . . arising under this Constitution . . . and Treaties made or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

- **U.S. Constitution, Article VI, Clause 2**

  This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

INTRODUCTION

The Ninth Circuit has abandoned a long judicial tradition of holding that local and state action which involves the foreign affairs of the United States federal government is preempted.

Reasoning that expressive conduct which explicitly accuses Japan, an ally, of war crimes and violations of international human rights falls into the category

of a "traditional responsibility" of a small city, and ignoring the conflict between the federal government's policy choice, and a local government's policy demands to a foreign power, the Ninth Circuit has announced a new rule limiting federal preemption in foreign affairs, stating that the Supremacy Clause does not preempt "a local government's expression, through a public monument, of a particular viewpoint on a matter related to foreign affairs," even if the local government's viewpoint is markedly different from the stated policy of the United States in that matter. *Gingery v. City of Glendale*, 831 F.3d 1222, 1229 (9th Cir. 2016) (emphasis added). The Ninth Circuit correctly concluded that Petitioners, who are of Japanese heritage, have standing to assert their claims below, because the city's action interferes with their ability to use and enjoy the city's Central Park and Senior Center on the same terms as non-Japanese persons due to the presence of the monument, which has become a flashpoint for anti-Japanese demonstrations.

The Ninth Circuit's holding purports to limit the power of the federal government to demand a single, unitary policy and single, unitary point of view on behalf of the entire United States. Under the rule in *Gingery*, any city or state may "express" its own foreign policy if it decides to "put itself on the international map." The rule in this case also allows state and local governments take positions that are inconsistent with the foreign policy of the United States government and its treaties with foreign powers. State and local governments may ignore U.S. foreign policy, label our allies as guilty of war crimes, demand reparative action by a sovereign nation, so

long as that city states its foreign policy demands in a granite plaque affixed to a permanent bronze sculpture in a public park.

The opinion departs from a well-established body of Supreme Court precedent supporting the foreign affairs preemption doctrine, and distinguishes the Ninth Circuit's *en banc* opinion in which declined to rule on the topic of state government expressive speech regarding foreign policy. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 & n.5 (9th Cir. 2012) ("We need not and do not offer any opinion about California's ability to express a particular viewpoint on a matter of foreign affairs by, for example, declaring a commemorative day.")

The Supreme Court has never held that local governments are free to set their own foreign policy through "expressive speech"; instead this Court has consistently held state action in the area of foreign affairs is preempted unless the action is a traditional state government function, and even then it may be preempted if the state action is not consistent with federal foreign policy as matter of conflict preemption. *See*, *e.g.*, *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), 389 U.S.429 (1968); *Deutsch v. Turner Corp.*

Here, the Ninth Circuit has strayed from long-established Supreme Court precedent, and modified the holding in *Movsesian* to hold that the Supremacy Clause does not preempt "a local government's expression, through a public monument, of a particular viewpoint on a matter related to foreign affairs," even when that municipality inserts itself into a contested matter of international diplomacy by insisting that a

foreign sovereign must "accept historical responsibility" for alleged war crimes and alleged international human rights violations that are not asserted by the federal government, and indeed are the subject of cautious diplomacy. *Gingery v. City of Glendale*, 831 F.3d 1222 (9th Cir. 2016).

This suit challenges the unconstitutionality of the installation and maintenance of an 1,100-pound bronze sculpture and granite plaque by the city of Glendale, California, that castigates Japan for alleged kidnapping and enslavement of 200,000 women, condemns Japan as guilty of alleged war crimes and international human rights violations, and "urg[es] the Japanese Government to accept historical responsibility for [its alleged] crimes." (App.3a)

The Ninth Circuit upheld Glendale's action by ignoring longstanding Supreme Court precedent in *Garamendi* and *Zschernig* and impermissibly narrowing its prior decisions in *Movsesian*, *Von Saher*, and *Deutsch*, which hold the United States federal government has exclusive foreign affairs power under the United States Constitution. The federal government's power is preemptive of Glendale's attempt to pressure and coerce Japan into actions inconsistent with international treaties and U.S. foreign policy.

The Ninth Circuit's holding is incorrect as a matter of law and fact. It constitutes a danger to U.S. interests, by incorrectly conflating a small city's attempt to "put itself on the international map" in legislating its own foreign policy with mere symbolic, expressive speech. The Ninth Circuit's validation of Glendale's anti-Japan action is inconsistent with the

constitutional structure. It cannot be reconciled with decisions of the Supreme Court which establish that the Unites States federal government has the exclusive power to regulate foreign affairs.

Worse, the actions by the City of Glendale harm and interfere with the typically warm and friendly relations between the United States and its ally, the nation of Japan.

A. Factual Background

The City of Glendale, a mid-sized municipality in the north central area of Los Angeles County, California, decided to "put itself on the international map" by thrusting itself into a delicate area of foreign diplomacy and international policy. In 2013, Glendale approved and installed a public monument in its Central Park, which Glendale has described as "a Korean Sister City 'Comfort Woman' Peace Monument" and which was commissioned and purchased by a pro-Korea interest group ("Monument").[1] The Monument includes two parts: (1) a 1,100-pound, symbolically expressive bronze sculpture of a woman with a bird on her shoulder, seated next to an empty chair; and (2) a granite narrative plaque which explains the sculpture's symbolism, and which then goes on to demand that Japan apologize and "take historical responsibility" and for its alleged role in

---

[1] The Monument was sponsored by a private group in the Republic of Korea and by the "Korean American Forum of California (KAFC)," who lobbied Glendale to approve and adopt the Monument, and who filed one of four different *amicus* briefs stating its view—one of four—of the historical debate over the "Comfort Women."

state-sponsored abduction and sexual enslavement of "more than 200,000 Korean and Dutch women" before during the Second World War. (Appendix, ["App."] App. 46a-47a ¶11)

Glendale's accusations and demands do not reflect the foreign policy positions of the United States government, and Japan strongly disagrees with Glendale's excoriation on historical, factual, policy, and political grounds. But Glendale has continued to maintain and defend the sculpture and the plaque since 2013 over repeated strenuous objections from Japanese officials at the highest levels of the government of Japan. Japan asserts that Glendale's accusations are factually incorrect, distort the historical record, and depart from international law. (App.48a-49a ¶16) Indeed, the historical record concerning "Comfort Women" during the period of World War II continues to be hotly debated by Asian nations, and has been the subject of several high-level resolutions, official public statements, diplomatic negotiations, and international discussions among these nations over the past several decades. (App.48a-51a) It is fair to say that the resurgence of the historical "Comfort Women" issue is a clever proxy war by Korea to humiliate Japan and gain regional dominance.

Considering these tensions, the United States government has adopted a measured and careful position on this sensitive topic, attempting to broker agreements and understanding between and among its various strategic partners and military allies. (App.55a-57a) For example, in 2001, in a lawsuit seeking damages for the alleged harms to the "Comfort Women" the "the Executive [] determined

that choosing between the interests of two foreign states would adversely affect the foreign relations of the United States. . . . ." and that adjudication of the dispute in the United States "not only 'would undo' a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan's 'delicate' relations with China and Korea, thereby creating 'serious implications for stability in the region.'" *Joo v. Japan*, 413 F. 3d. 45, 52 (D.C. Cir. 2005) *cert denied* 546 U.S. 1208. (quoting 2001 Statement of Interest at 34-35).

Glendale's policy statements, castigations, and demands to Japan are not consistent with the foreign policy of the United States. The United States of America has not accused Japan of "war crimes" or other international human rights violations regarding the "Comfort Women." The United States has not demanded that the nation of Japan "take historical responsibility" for "crimes." The United States has not adopted an official historical narrative as to the nature, extent, and numbers of "Comfort Women." The United States has not demanded that Japan should "accept historical responsibility" for alleged war crimes or alleged violations of international human rights.

Petitioner Koichi Mera is a Japanese-American resident from the City of Los Angeles. GAHT-US is a California nonprofit public benefit corporation with nearly 500 members, including Mr. Mera. GAHT-US provides educational resources to the public concerning the history of World War II with an emphasis on Japan's role. (App.44a) Petitioners are deeply offended by the Monument, especially Glendale's historical

accusations and disagree with Glendale's demands to Japan, a sovereign, and an important ally of the United States. (App.44a-45a, 122a-124a)

1. The Monument, the Sculpture, the Vote, and the Unapproved Text

On March 26, 2013, the Glendale City Council approved a motion to dedicate a plot of land in its Central Park, adjacent to its Senior Center, for sister-city related monuments and memorials. (Glendale has sister cities in Japan, and more recently developed sister city relationships within the Republic of Korea, but no Japanese sister cities have a monument in Central Park.) (App.44a ¶7)

During a special meeting on July 9, 2013, the City Council of Glendale approved the installation of the Monument. (App.51a ¶27)[2] The report submitted to the city council included a diagram of the proposed statute and its location in Central Park. (*Id.* ¶29) The materials presented did not include any of the text that would be on the carved granite plaque that accompanied the Monument. (*Id.* ¶51-52) The full text of the plaque reads as follows (emphasis added):

"I was a <u>sex slave of Japanese military</u>

- Torn hair symbolizes the girl being snatched from her home by the Imperial Japanese Army.

---

[2] There was no discussion regarding any potential "sister city monument" in honor of any of Glendale's sister cities in Japan, (or its sister cities in Armenia and Mexico, for that matter). (App.44a)

- Torn hair symbolizes the girl being snatched from her home by the Imperial Japanese Army.
- Tight fists represent the girl's firm resolve for a deliverance of justice.
- Bare and unsettled feet represent having been abandoned by the cold and unsympathetic world.
- Bird on the girl's shoulder symbolizes a bond between us and the deceased victims.
- Empty chair symbolizes survivors who are dying of old age without having yet witnessed justice.
- Shadow of the girl is that of an old grandma, symbolizing passage of time spent in silence.
- Butterfly in shadow represents hope that victims may resurrect one day to receive their apology.

PEACE MONUMENT

In memory of more than 200,000 Asian and Dutch women who were removed from their homes in Korea, China, Taiwan, Japan, the Philippines, Thailand, Vietnam, Malaysia, East Timor and Indonesia, to be coerced into sexual slavery by the Imperial Armed Forces of Japan between 1932 and 1945.

And in celebration of proclamation of "Comfort Women Day" by the City of Glendale

> on July 30, 2012, and of passing of House Resolution 121 by the United States Congress on July 30, 2007, urging the Japanese Government to accept historical responsibility for these crimes.
>
> It is our sincere hope that these unconscionable violations of human rights shall never recur.
>
> July 30, 2013."

This text was neither proposed to the City Council nor made the subject of a motion to the City Council, was never open to any public debate or discourse, and was never approved as required by local law. (App.52a ¶30)

These factual assertions, as well as the demand for action, are vigorously debated by scholars (including four different *amici* in the Ninth Circuit) as well as the governments of Korea and Japan. (App.52a ¶30)[3] In response to the 1998 Nazi War Crimes Disclosure Act, Public Law 105-246, *amicus* GAPH, a Chinese-American organization, persuaded Congress to also authorize and investigation into war crimes by the Japanese resulting in the Japanese Imperial Government Disclosure Act, Public Law 106-567 (2000). The Interagency Working Group (IWG)—consisting of top U.S. government officials—began researching alleged

---

[3] There are scholars who contend that many of these women were not "slaves" but were participants in the system of their own free will; others contend that the "Comfort Women" system should take into consideration other cultural and historical perspective of the people involved. (App.52a ¶30, 161a-179a, 202a-211a)

war crimes by the Japanese. After reviewing over 8.5 million pages, little evidence was reported, to the disappointment of pro-Korean interest groups who had hoped to unearth documentary evidence of Japanese war crimes. (App.169a-171a) Moreover, *amici* explain that the U.S. has previously declined to consider involvement of "Comfort Women" as a war crime because it was a then-acceptable, culturally traditional and locally legal practice. *Id.*

Numerous individuals, including Mr. Mera, members of GAHT-US, and other Japanese-Americans, strongly and repeatedly objected to the proposed installation of the Monument. The group argued that the issue of "Comfort Women" was the subject of diplomatic discussions between South Korea and Japan and an element of the United States' foreign relations with these countries. (App.52 ¶31) Nonetheless, the Monument was approved and unveiled on July 30, 2013, during a ceremony in Glendale's Central Park. (App.53 ¶33)

Glendale proceeded anyway with the intention that the Monument would influence foreign policy and gain attention from the international community. For example, City Council Member Laura Friedman commented: "We really put the city of Glendale on the international map today by doing this." (App.53 ¶34) In 2013, then-Mayor of Glendale, Dave Weaver, admitted the "issue did not have any bearing on the city itself, and was an international issue mainly between Japan and the Republic of Korea." (App.53a).

The monument sits alongside the City's Adult Recreation Center Plaza in Central Park, a heavily

trafficked area. (App.51a ¶27). Petitioners Mera and members of GAHT are local citizens of Japanese ancestry who would like to enjoy Glendale's Central Park as well as the amenities and services offered at the Senior Center, but are alienated by the Monument because it expresses anti-Japanese sentiment and adopts a view of Japan which they find highly offensive and objectionable. (App.45a ¶8, 57a ¶51). Moreover, Petitioners are alienated by Glendale's recognition of its Korean sister cities in an anti-Japanese manner, while none of Glendale's Japanese sister cities are recognized in any manner.

2. The Monument Has Increased International Tensions

The debate concerning "Comfort Women" continues to this day and has been a source of substantial tension between Japan and South Korea in recent decades. (App.49a ¶18.) Japan denies responsibility for the recruitment of the Comfort Women and asserts that all World War II-related claims, including those related to Comfort Women, were resolved pursuant to postwar treaties. (App.2a ¶¶21-23,106a,147a) South Korea, however, has historically contended that the Comfort Women issue remains unresolved and unredressed. (App.2a ¶20). Specifically, the Republic of Korea has critiqued the Japanese Government for evading its legal and moral responsibilities to these women, officially demanding a formal apology by Japan and restitution payments on several occasions over the past decade. Yet, the government of Japan has denied "coercive recruitment of women and enslavement of women" in Korea during WWII. Japan and certain historians dispute the alleged enslave-

ment of 200,000 women, stating the statistical analysis must be inflated. (App.2a ¶¶5-6,106a,147a).

Tensions between Japan and South Korea have increased in response to the erection of the Monument in Glendale, including anti-Japanese protests around and incorporating the Monument. (App.123a,125a, 181a-191a) Indeed, there was significant international outcry from the highest levels of the Japanese government following Glendale's installation of the Monument. In reaction to Glendale's Monument, Kuni Sato, the press secretary of the Japanese Ministry of Foreign Affairs, expressed Japan's official displeasure, remarking that installation of the Public Monument "does not coincide with our understanding" of the Comfort Women dispute. (App.49a ¶¶20, 24)

On July 31, 2013, Kenichiro Sasae, Japanese Ambassador to the United States, declared that Glendale's action is "irreconcilable" with the position of the Government of Japan and is "highly regrettable." (App.53a ¶37) On August 13, 2013, Japanese Prime Minister Shinzo Abe stated that he was "extremely dissatisfied" with the installation of the Public Monument. (App.54a ¶41)

The United States has a specific foreign policy stance on the "Comfort Women" issue, seeking to broker compromise and resolution between South Korea and its ally Japan on this issue. (App.55a ¶¶43-48) For example, on April 25, 2014, during the pendency of this action, President Obama expressed a portion of the United States' foreign policy view while visiting Seoul, South Korea, and declared that the "Comfort Women" issue will require the "coordinated

effort of our three countries." The President did not demand that Japan "accept historical responsibility," nor did he suggest that the Japanese were guilty of unresolved war crimes. (App.71a)

During this appeal, and with the assistance and support of the United States, Japan and South Korea entered into a binding international agreement on December 28, 2015 that sought to "final[ly] and irreversib[ly]" resolve the issue after 70 years of intractable debate.[4] As a precondition, Japan has insisted that South Korea remove a monument in Seoul almost identical to the Monument in Glendale's Central Park.[5, 6]

On January 6, 2017, as counsel was completing this writ petition, the landmark deal between Japan and South Korea was falling apart: responding to Korea's refusal to remove an identical golden "Comfort Woman" sculpture from a position facing the Japanese embassy in Busan, Korea, Japan removed top diplomats

---

[4] *Japan and South Korea Agree To WW2 'Comfort Women' Deal*, BBC NEWS (Dec. 28, 2015), www.bbc.com/news/world-asia-35188135.

[5] Ju-min Park, *a Monument of a 'Comfort Woman' Is Testing a Landmark Agreement Between Japan and South Korea*, REUTERS (Dec. 28, 2015), www.businessinsider.com/comfort-woman-monument-testing-landmark-agreement-between-japan-south-korea-2015-12.

[6] Prakash Panneerselvam and Sandhya Puthanveedu, *6 Months Later*: *The 'Comfort Women' Agreement*, THE DIPLOMAT (May 11, 2016), http://thediplomat.com/2016/05/6-months-later-the-comfort-women-agreement/

from South Korea.[7] (By the time the Court reads this petition, the situation will have substantially changed, to be sure.) (App.119a)

B. Procedural History

The district court granted an initial motion by the City of Glendale to dismiss the Petitioners' complaint, without granting leave to amend even once. *Gingery*, 2014 WL 10987395 (C.D. Cal. Aug. 4, 2014). Because the district court declined to exercise supplemental jurisdiction, Petitioners' second cause of action under state law for violation of the Glendale municipal code was dismissed without prejudice (and is asserted in a separate lawsuit in the California courts.) *Id.*

The Ninth Circuit Court of Appeals held that Petitioners had Article III standing to assert their claims, because the Petitioners had sufficiently alleged injury-in-fact, but affirmed the lower court's dismissal, finding Glendale's conduct not preempted because "Glendale's installation of the monument concerns an area of traditional state responsibility and does not intrude on the federal government's foreign affairs power." *Gingery v. City of Glendale*, 831 F.3d 1222 (9th Cir. 2016). The Ninth Circuit affirmed, again, without granting leave to amend.

The Ninth Circuit admitted that it was limiting the power of the federal government in its exercise of

---

[7] Merrit Kennedy, *'Comfort Woman' Statue Sparks Diplomatic Row Between Japan And South Korea*, National Public Radio, (January 6, 2017) http://www.npr.org/sections/thetwo-way/2017/01/06/508538196/comfort-woman-statue-sparks-diplomatic-row-between-japan-and-south-korea

the foreign affairs power, admitted that its holding had created new law in the Ninth Circuit:

> we have not considered [] the extent to which a state or local government may address foreign affairs through expressive displays or events, rather than through remedies or regulations. In *Movsesian*, for example, we emphasized that the law at issue was not 'merely expressive' and declined to 'offer any opinion about California's ability to express support for Armenians by, for example, declaring a commemorative day . . . . Here, we confront a variant of the issue we left open in *Movsesian*: whether the Supremacy Clause preempts a local government's expression, through a public monument, of a particular viewpoint on a matter related to foreign affairs. Under the circumstances of this case, we conclude that it does not.

Gingery v. City of Glendale, 831 F.3d 1222, 1229 (9th Cir. 2016) (emphasis added) *distinguishing Movsesian* 670 F.3d at 1076-77. & n. 5.

In a concurring opinion, District Judge Korman observed that the "Supreme Court's cases dealing with preemption specifically in the foreign affairs domain do not suggest the availability of an equitable cause of action outside of the regulatory context," and reasoned that Petitioners had failed to state a valid cause of action, despite their standing to sue. *Id.* at 1234. The concurring opinion emphasized the constitutional importance of the case but omitted any statement as to whether the Ninth Circuit ought to

have granted Petitioners leave to amend. *Id.* Petitioners' motion for reconsideration *en banc*, which raised these concerns, was summarily denied. (App.39a, 142a-160a)

Petitioners respectfully submit the ruling of the Ninth Circuit runs afoul of Supreme Court's foreign affairs powers decisions, dictating reversal. Accordingly, Petitioners submit this timely petition for a writ of *certiorari* to resolve the City's improper intrusion upon the foreign affairs powers reserved to the federal government by the express terms of the United States Constitution.

REASONS FOR GRANTING THE PETITION

"There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 123 S.Ct. 2374, 2386, 156 L.Ed.2d 376 (2003)[8]; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, n. 25, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381-382, n. 16, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) ("'[T]he peace of the WHOLE ought not to be left at the disposal of a PART'" (quoting The

[8] Unless otherwise indicated, all emphasis is added.

Federalist No. 80, pp. 535-536 (J. Cooke ed.1961) (A. Hamilton); *Id.*, No. 44, at 299 (J. Madison) (emphasis original, adding "the advantage of uniformity in all points which relate to foreign powers"); *Id.*, No. 42, at 279 (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations"); *see also First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) (plurality opinion) (act of state doctrine was "fashioned because of fear that adjudication would interfere with the conduct of foreign relations"); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) (negative Foreign Commerce Clause protects the National Government's ability to speak with "one voice" in regulating commerce with foreign countries (internal quotation marks omitted)).

The conduct of foreign policy is one of the few "uniquely federal areas of regulation." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 604, 131 S.Ct. 1968, 1983, 179 L.Ed.2d 1031 (2011) The avoidance of multiple foreign policies was a central tenet of our federal system of government, espoused by the framers of the Constitution. Indeed, as early as 1840, this Court explained: "it was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575-76 (1840). *See also United States v. Belmont*, 301 U.S. 324, 331 (1937) ("The external powers of the United States are to be exercised without regard to state laws or policies . . . [I]n respect of our foreign relations gener-

ally, state lines disappear".); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power".); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference").

To accomplish this "main purpose" of the Constitution, to make the U.S. "one people" with "one voice" that is "free from local interference," this Court has consistently held that state laws intruding on the exclusively federal power over the nation's foreign affairs are preempted.

In *United States v. Pink*, 315 U.S. 203, 233, 62 S.Ct. 552, 86 L.Ed. 796 (1942) and *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941) the Supreme Court recognized that the Constitution implicitly grants to the federal government a broad foreign affairs power. *See also Deutsch*, 324 F.3d at 709 ("the Supreme Court has long viewed the foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government").

The existence of this foreign affairs power implies that, even if the federal government has taken no action on a particular foreign policy matter, the state is not free to express its own foreign policy viewpoint on that issue. Even in the absence of any treaty, federal statute, or executive order, a state law may be unconstitutional if it "disturb[s] foreign rela-

tions" or if the state "establish[es] its own foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 440-41, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968).

In *Zschernig*, an Oregon statute that did not conflict with any express federal policy was preempted because it invited courts to conduct detailed inquiries into the political systems and conduct of foreign nations. *Id.* at 433-44. The Court observed, "it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. Yet, they are of course matters for the Federal Government, not for local probate courts." *Id.* at 437-38. Because the statute involved "criticism of nations established on a more authoritarian basis than our own . . . [it] affect[ed] international relations in a persistent and subtle way," and therefore was preempted. *Id.* at 440, 88 S.Ct. 664.

Circuit courts have typically applied the rule and reasoning in *Garamendi*, to find that field preemption simply prohibits the states and their subdivisions simply to take a position or express a viewpoint on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility; whereas the companion doctrine of conflict preemption applies when a state's action in an area of "traditional state responsibility" is carried out in a way that affects foreign relations.

In the seminal Ninth Circuit case of *Movsesian*, the Cirucit, *en banc*, applied *Garamendi* to hold that the Supremacy Clause preempts any state action "when a state law (1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs

power." *Movsesian*, 670 F.3d at 1076 (extending insurance claim statute of limitations for victims of the Armenian Genocide did not concern an area of traditional state responsibility); *See Von Saher*, 592 F.3d at 965 (providing a forum for Holocaust restitution claims, while "a laudable goal, it is not an area of 'traditional state responsibility,' and the statute is therefore subject to a field preemption analysis."); *Garamendi*, 539 U.S. at 425 (no state interest in "regulating disclosure of European Holocaust-era insurance policies"). *Zschernig*, 389 U.S. at 435-36 (finding preempted an Oregon statute because it invited courts to engage in an analysis of foreign governments and their conduct).

Indeed, prior to the ruling below, there was no authority holding "that a state [or municipal] government's First Amendment interests, if any, should weigh into a consideration of whether a state has impermissibly interfered with the federal government's foreign affairs power," *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 62 (1st Cir. 1999), *aff'd on other grounds*, 530 U.S. 263 (2000).

Prior to the *Gingery* decision, *Garamendi* has been uniformly applied at the Circuit Court level to preempt state laws that regulate foreign affairs, most notably in situations where states intend to express a foreign policy viewpoint through regulation of commercial transactions—specifically dealing with state governments that wish to express their viewpoints through legislative enactments that are intended to respond to perceived war crimes and human rights abuses. *See id.*, at 61 n. 18 (state law concerning human rights abuses in Burma/Myanmar preempted): *Von*

Saher, 592 F.3d 964 (state law concerning Nazi-looted artwork); *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 11, 1st Cir.(Mass.); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 578, 5th Cir.(La.) (same); *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115, 2nd Cir.(N.Y.) (same); *cf. In re Nazi Era Cases Against German Defendants Litigation,* 196 Fed.Appx. 93, 98, 3rd Cir.(N.J.) (Holocaust survivor's action); *Saleh v. Titan Corp.*, 580 F.3d 1, 11, D.C.Cir. (tort claims against civilian contractors, based on abuses in Abu Ghraib prison in Iraq).Thus if the decision below stands, a circuit split will likely develop as other jurisdictions either expand or resist the exception to foreign affairs preemption announced by the Ninth Circuit that "expression" of state and local government foreign policy "viewpoints" through permanent monuments or otherwise.

The Ninth Circuit incorrectly found that neither doctrine applied under the facts of the case as pled by Plaintiffs. That finding is at least in part attributable to an over-simplification of this Court's nuanced analysis in *Garamendi*. *Certiorari* should be granted to clarify the rules of field and conflict preemption last explained in *Garamendi*.

I. THE NINTH CIRCUIT MISINTERPRETED THE PREEMPTION STANDARDS IN *GARAMENDI* TO PERMIT STATES TO "EXPRESS" THEIR OWN FOREIGN POLICY

The Supreme Court last considered but did not draw a clear line rule on the question of when and whether field preemption or conflict preemption would apply thirteen years ago, in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419-21, 123 S.Ct. 2374,

156 L.Ed.2d 376 (2003). The absence of a clear standard opened the opportunity for the Ninth Circuit to announce the rule in this case.

In *Garamendi*, the Court revisited *Zschernig v. Miller*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968), noting:

> "It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, but the question requires no answer here . . . .the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law. [But] it is legislation within "areas of . . . traditional competence" that gives a State any claim to prevail, [citation], it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."

Id. The Court added, in a footnote:

> "Where, however, a State has acted within what Justice Harlan called its "traditional competence," 389 U.S., at 459, 88 S.Ct. 664, but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional

> importance of the state concern asserted. Whether the strength of the federal foreign policy interest should itself be weighed is, of course, a further question. *Cf. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947) (congressional occupation of the field is not to be presumed "in a field which the States have traditionally occupied"); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-508, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) ("In an area of uniquely federal interest," "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption").

Garamendi, 539 U.S at 420 n.11. The analysis of the Ninth Circuit has oversimplified the nuanced analysis suggested by the Court in *Garamendi*, leading to an erroneous result.

II. THE FEDERAL GOVERNMENT HAS THE EXCLUSIVE POWER TO SET POLICY REGARDING "COMFORT WOMEN"

The Ninth Circuit has typically held, even in the absence of any express federal policy, that a state action may be preempted as a matter of field preemption where (1) its "real purpose" does not concern an area of traditional state responsibility, and (2) it intrudes on the federal government's foreign affairs power. *Movsesian*, 670 F.3d at 1074-75. When the action does 'concern an area of traditional state responsibility" it applies doctrine of conflict preemption, a state action must yield to federal authority where

"there is evidence of clear conflict between the policies adopted by the two." *Id.*

A. The Monument Is Preempted Because Its "Real Purpose" Is to Influence Foreign Affairs

Here, Glendale's actions are preempted because they overstep state and local authority by "intru-[ding] . . . the State into the field of foreign affairs." *Garamendi*, 539 U.S. at 417 (quoting *Zschernig*, 389 U.S. at 432).6F[9]

1. Glendale Cannot Seriously Claim That Its Plaque Castigating Japan and Demanding Action Addresses Any Traditional Responsibility of a Municipal Government

The phrase "traditional state responsibility" (*Movsesian*, 670 F.3d at 1074) has never before been extended, as it is here, to include a state or local government's castigation of a U.S. ally for decades-old alleged crimes and violations of international human rights.

Municipalities traditionally address the health, safety and welfare of its own citizens, at the local level, by providing fire and police protection, road repairs, parks, playgrounds, social services, and transportation. Municipalities regulate land use and businesses, and private conduct within its borders.

Glendale might be responsible for beautification of its city park; building economic ties with "sister

---

[9] Municipalities and states are subject to the same rules of preemption. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

cities"; or recognizing its own citizens' participation in World War II; or commemorating undisputed local events in California, unfortunate mistreatment of Japanese-American citizens in Glendale during that period; or city beautification through artistic expression; or expressing by proclamation certain local ideals.

But there is no nexus between the pointed allegations, accusations and specific policy demands to Japan, a foreign nation, stated in the plaque and any "traditional area of responsibility" for a city government. To the contrary, Glendale "may not tell the Nation or Japan how to run their foreign policies." *Japan Line, Ltd. v. Los Angeles County.*, 441 U.S. 434, 455 (1979).

The Ninth Circuit rejected field preemption, reasoning, "Glendale's establishment of a public monument to advocate against 'violations of human rights' was well within the traditional responsibilities of state and local governments." 831 F.3d at 1229-30.However, the Ninth Circuit misunderstood the facts, and failed to apply the test of *Garamendi*, *Zschernig*, *Movsesian*, *Von Saher*, and *Deutsch* that required it to consider the "real purpose" of Glendale's action. *See*, *e.g.*, *Movsesian*, 670 F.3d at 1076. Nor did it consider the allegations in the light most favorable to the Plaintiffs as is required. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012).

The real purpose of the monument is not merely to commemorate "Comfort Women." Its purpose is to hold Japan accountable for alleged war crimes and human rights violations, and demand action by Japan. As a salient example, Councilmember and

attorney Zareh Sinanyan, made clear that Glendale intended to insert itself into foreign affairs, explaining that *Movsesian* likely invalidated the action:

> Another argument [is that] Glendale has no authority to do anything about this issue, it's a federal issue. Just last year, the Turkish government pushed a lawsuit which they succeeded on in the Ninth Circuit making the exact same argument, saying that the recognition of the Armenian genocide by state authorities was not proper . . . (App.101a)

Councilmember Friedman revealed Glendale's true purpose, commenting: "We really put the city of Glendale on the international map today by doing this." (App.54a) The Ninth Circuit avoided the "real purpose" of Glendale's act by incorrectly limiting the expressive meaning of the monument to its merely symbolically expressive aspects (as reflected in the bronze sculpture) as simply "commemorating the 'Comfort Women,'" and "advocate[ing] against "violations of human rights,'" in a general sense, effectively modifying the facts alleged to suit the panel's desired outcome. 831 F.3d 1230. By paraphrasing the plaque, as simply "memorializing victims and expressing hope that others do not suffer a similar fate" and selectively avoiding the inflammatory aspects of the plaque's language and omitting virtually every plaque provision critical of the Japanese, the Ninth Circuit redefined the controversy and made its incorrect decision appear more constitutionally acceptable. (App.13a) The omission of Glendale's real purpose: casting blame on Japan, and pressuring Japan to "accept historical

responsibility for these crimes" admits the true facts of the actual inflammatory and anti-Japan language of the plaque demands a reversal. (App.97a, App.202a, 101a) Indeed, current events indicate that Glendale's Monument is playing a role in the complex and rapidly deteriorating relationship between Japan and South Korea over this issue and other issues. (App.185a, noting there are 34 monuments in Korea nearly identical to Glendale's Monument) That is not the role of a municipality.

Moreover, the "real purpose" of Glendale's Monument is to express an anti-Japan viewpoint. The text of the plaque permanently affixed to the Public Monument presents an explicitly pro-Korean and anti-Japanese view of historical events during World War II. By demanding reparations from the Japanese government for events decades ago, Glendale's "real purpose" is undoubtedly to help Korea attain those concessions from Japan.

The anti-Japan tenor of the Monument is also a painful reminder of the anti-Japanese sentiment in Los Angeles, California, and this nation, that led to a shameful series of human rights abuses in *this* nation: none of those "crimes" or "violations of rights" are commemorated in Glendale's Central Park, although some of them occurred a few miles away at Griffith Park and Santa Anita Racetrack.[10]

---

[10] *See* National Archives, JAPANESE RELOCATION DURING WORLD WAR II, at: archives.gov/education/lessons/japanese-relocation; National Park Service, A BRIEF HISTORY OF JAPANESE AMERICAN RELOCATION DURING WORLD WAR IIat: nps.gov/articles/historyinternment.htm; U.S. Army Corps of

It is very strange that a small city in California with a small Japanese population would choose the nation of Japan as the target for its outrage in light of its own local history. The attenuated connection between Glendale's local interest and local commemoration and the subject matter of the Monument belies Glendale's argument that "real purpose" of the monument is a traditional local government responsibility. Nowhere in the record does Glendale point to any local interest of commemorative aspect of the "Comfort Women" issue. Glendale has sister cities in Korea, and in Japan, so the "strength of the [local] interest, judged by standards of traditional practice" is exceedingly weak and attenuated. *See Zschernig v. Miller*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968). The obvious "real purpose" of the Monument—taking sides in a matter of international import—has little if anything to do with Glendale's traditional responsibilities as a municipality.

2. Glendale's "Expressive" Anti-Japan Policy Conflicts with and Intrudes on U.S. Federal Diplomacy

Even if the Ninth Circuit is correct that a local government may as part of its traditional responsibilities engage in expressive conduct related to foreign affairs that merely memorializes and commemorates, conflict preemption dictates that the state and local governments may not urge and advocate that a foreign nation take a course on a contested matter of

---

Engineers, BURBANK PRISONER OF WAR PROCESSING STATION, at: militarymuseum.org/GriffithParkPW%20Camp.html

foreign affairs, particularly when the U.S. has made careful policy choices in a fraught diplomatic puzzle.

Here, Glendale seeks to use a bronze sculpture and a granite plaque, "where the President has consistently chosen kid gloves. The efficacy of the one approach versus the other is beside the point, since preemption turns not on the wisdom of the National Government's policy but on the evidence of conflict." *See Garamendi*, 539 U.S. at 399. Indeed, foreign affairs preemption is most appropriate "when state action reflects a state policy critical of foreign governments and involves "sitting in judgment" on them." *Id.* at 439. (Ginsburg, J., joined by Stevens, Scalia, and Thomas, JJ., dissenting) (citation and quotation marks omitted and emphasis added). Yet that is just what Glendale did in installing the Monument. Glendale expressed in a permanent monument its viewpoint that Japan should rectify its past crimes and human rights violations. (App.34a ¶11.)

Glendale's conduct is preempted because it is more than "merely expressive" or "commemorative," *Movsesian*, 670 F.3d at 1077 & n.5; it advocates (through coercion and interference) that Japan take actions that the federal government has never urged. running roughshod over deliberately cautious diplomacy on this sensitive issue.

Glendale's conduct has "more than some incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 434 (internal citations omitted); *Movsesian*, 670 F.3d at 1072. Reactions from the highest ranks of the Japanese government—including the Prime Minister, the Chief Cabinet Secretary, and Japan's Ambassador to the United

States—are detailed in Plaintiffs' complaint. (App.51a ¶¶36-42.) And the record reflects that, since 2013, there has been an international outcry over the "Comfort Women" historical controversy which is part of the U.S.' engagement with South Korea and Japan, culminating in an international treaty over the issue in 2015. (App.71a, 113a) But, as of this writing, that treaty appears to be in serious jeopardy over an identical statue to the Glendale Monument.

Just as Glendale cannot install a monument urging Israel to accept Jerusalem as the Capital of Palestine, *cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2094 (2015), it cannot urge Japan to accept historical responsibility for contested World War II acts. Calling one of the United States' closest allies to account for war crimes is not a traditional local or state responsibility and cannot "be fairly categorized as a garden variety" commemorative memorial, *Von Saher*, 592 F.3d at 964. Indeed, the United States Constitution assigns Congress the power to define "Offences against the Law of Nations" (United States Constitution, Article I, Section 8, clause 10).

Nor is it a traditional local interest for Glendale to involve itself in a debate that implicates U.S. relations and interests in Japan, South Korea, China and North Korea.[11]

---

11 *North Korea, China Want to Undo the Japan-South Korea Alliance That the U.S. Helped Broker*, FOXNEWS (Aug. 8, 2016), http://www.foxnews.com/opinion/2016/08/08/north-korea-china-want-to-undo-japan-south-korea-alliance-that-us-helped-broker.html.

B. Even if Glendale's Actions Were Part of Its "Traditional Responsibility", Conflict Preemption Applies Because Glendale Has Contradicted the Foreign Policy of the United States Regarding "Comfort Women."

The Ninth Circuit did not apply conflict preemption, reasoning "Plaintiffs do not argue that Glendale's installation of the monument conflicts with the federal government's policy on the "Comfort Women" dispute; indeed, the complaint alleges that the United States has 'consistently sought to avoid' taking a position on the issue."831 F.3d 1229. This is wrong. The viewpoint expressed by Glendale's Monument, taking Korea's "side" in the dispute conflicts with the demonstrated U.S. policy choice to "avoid taking sides," which is itself a trigger for conflict preemption under *Garamendi*.

Even assuming erecting public monuments which explicitly castigate the allies of the United States and demanding action by those allies was an area of "traditional competence" where the foreign policy implications were only incidental to that responsibility, state and local government speech must still comport with other legal and constitutional provisions, especially permanent monuments because they "endure[,] monopolize the use of the land on which they stand and interfere permanently with other uses of public space."). *See Pleasant Grove v. Summum*, 555 U.S. 460, 469, 478-79 (2009)

Petitioners alleged sufficient facts to demonstrate that Glendale's viewpoint on foreign policy, embodied in the permanent granite plaque, is deeply divergent from the express foreign policy of the

United States as expressed in treaties, court filings, executive statements, and diplomatic engagement with the other nations involved, in an effort to avoid upsetting a delicate situation. (App.55a-60a)

The U.S. Government has a policy of not interfering or castigating Japan over the "Comfort Women," while also engaging with Japan and Korea over the issue: "the Executive ha[d] determined that choosing between the interests of two foreign states would adversely affect the foreign relations of the United States. . . . ." taking an active role "not only 'would undo' a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan's 'delicate' relations with China and Korea, thereby creating 'serious implications for stability in the region.'" *Joo v. Japan*, 413 F. 3d. 45, 52 (D.C. Cir. 2005) *cert denied* 546 U.S. 1208. (quoting 2001 Statement of Interest at 34-35).

Glendale apparently had little regard for how its expression of its foreign policy viewpoints might impact stability in Asia when it approved, installed and maintained of the "Comfort Women" monument, calling Japan to account for alleged "war crimes" and demanding the Japanese Government, admit to human rights violations.

The foreign affairs doctrine is intended to allow the federal government a free hand—even when it has not chosen to take specific steps. *See Hines v. Davidowitz*, 312 U.S. at 63. Here, Glendale's international activism on behalf of Korea directly conflicts with the federal government, even if the federal government's policy choice is to not engage in adjudica-

tion of the dispute but rather to facilitate rapprochement between other nations.

With a new presidential administration about to take office, the Court can easily see how state and local governments could take foreign policy positions that are "expressive" or established through "public monuments" that are markedly different from the policies of the federal government, sowing confusion around the world and unraveling the very fabric of the union the Constitution was designed to create.

Can Toledo, Ohio, decide to establish its own foreign policy by erecting a "public monument" that "expresses" a policy urging Burma to accept responsibility for incursions into the territory of the People's Republic of China, or for China to offer more favorable trade relations to Burma? *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 n. 18 (1st Cir. 1999). Can Lubbock, Texas establish its own foreign policy by erecting a "public monument" that "expresses" its view urging Israel to recognize Jerusalem as the capital of Palestine? *cf. Zivotofsky*, 135 S.Ct. at 2094. Under the Ninth Circuit's flawed reasoning, such local pronouncements might be ruled constitutional because they are merely "expressive" of the "viewpoints" of the states and localities that would like to "put themselves on the international map."

The Constitution could not be clearer on this issue. We are one nation, that speaks to the international community with one voice.

Glendale is not empowered by the United States Constitution to set its own foreign policy or make demands of Japan. The Constitution assigns that role to the federal government. Glendale's action is

preempted by the Supremacy Clause. The Constitution dictates that the United States government is the only authority permitted to set the foreign policy of this nation on the issue of "Comfort Women" and any other matter of international concern without local interference by municipalities.

It has never been more important for this nation to speak to the world with one voice whenever it is possible, and thus even well-intentioned state and local "expressive" action must be preempted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM B. DECLERCQ
COUNSEL FOR PETITIONERS
DECLERCQ LAW GROUP, INC.
225 S. LAKE AVENUE, SUITE 300
PASADENA, CA 91101
(626) 408-2150
WILLIAM@DECLERCQLAW.COM

JANUARY 11, 2017

APPENDIX TABLE OF CONTENTS

OPINION OF THE NINTH CIRCUIT (AUGUST 4, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHIKO SHIOTA GINGERY, an individual; KOICHI MERA, an individual; GAHT-US CORPORATION, a California non-profit corporation,

Plaintiffs-Appellants,

v.

CITY OF GLENDALE, a municipal corporation,

Defendant-Appellee.

No. 14-56440

D.C. No. 2:14-cv-01291-PA-AJW

Appeal from the United States District Court for the Central District of California Percy Anderson, District Judge, Presiding

Before: Stephen REINHARDT, and Kim McLane WARDLAW, Circuit Judges, and Edward R. KORMAN,* Senior District Judge.

WARDLAW, Circuit Judge:

---

* The Honorable Edward R. Korman, Senior District Judge for the U.S. District Court for the Eastern District of New York, sitting by designation.

In 2013, the City of Glendale installed a public monument commemorating the "Comfort Women," an unknown number of women that South Korea asserts, but Japan disputes, were forced to serve as sexual partners to members of the Japanese Imperial Army during World War II and the decade preceding it. Plaintiffs, a Japanese-American resident of Los Angeles and a non-profit organization, claim that Glendale's installation of the "Korean Sister City 'Comfort Woman' Peace Monument" intrudes on the federal government's exclusive foreign affairs power and is thereby preempted under the foreign affairs doctrine. We conclude that Plaintiffs have standing to challenge Glendale's installation of the monument but have failed to state a claim that Glendale's actions are preempted. Accordingly, we affirm the district court's judgment dismissing Plaintiffs' preemption claim with prejudice.

I. Factual and Procedural History

For several decades, Japan and South Korea have engaged in a heated and politically sensitive debate concerning historical responsibility for the Comfort Women. South Korea has urged Japan to redress grievances relating to the Comfort Women. Japan denies responsibility for the recruitment of the Comfort Women and asserts that, in any event, all World War II-related claims, including those related to the Comfort Women, were resolved pursuant to postwar treaties between Japan and the allied nations. According to Plaintiffs' complaint, the United States has generally "avoid[ed] taking sides" and encouraged Japan and South Korea to resolve the dispute through "further government-to-government negotiations."

On July 9, 2013, the Glendale City Council approved the installation of the "'Comfort Woman' Peace Monument" in Glendale Central Park, a public park in Glendale, California. Unveiled three weeks later, the monument is a 1,100-pound bronze statue of a young girl in Korean dress sitting next to an empty chair with a bird perched on her shoulder. Alongside the statue is a bronze plaque, which reads in part:

> In memory of more than 200,000 Asian and Dutch women who were removed from their homes in Korea, China, Taiwan, Japan, the Philippines, Thailand, Vietnam, Malaysia, East Timor and Indonesia, to be coerced into sexual slavery by the Imperial Armed Forces of Japan between 1932 and 1945.
>
> And in celebration of proclamation of "Comfort Women Day" by the City of Glendale on July 30, 2012, and of passing of House Resolution 121 by the United States Congress on July 30, 2007, urging the Japanese Government to accept historical responsibility for these crimes.
>
> It is our sincere hope that these unconscionable violations of human rights shall never recur.

Plaintiffs Michiko Shiota Gingery, GAHT-US Corporation ("GAHT-US"), and Koichi Mera claim that the monument interferes with the federal government's foreign affairs power and violates the Supremacy Clause. Plaintiffs' complaint further alleges that by installing the monument, Glendale "has taken a position in the contentious and politically-sensitive international debate concerning the proper historical

treatment of the former comfort women." In Plaintiffs' view, Glendale's monument disrupts the federal government's foreign policy of nonintervention and encouragement of peaceful resolution of the Comfort Women dispute. The complaint seeks an order declaring Glendale's installation of the monument unconstitutional and compelling Glendale to remove the monument from public property.[1]

The district court dismissed Plaintiffs' constitutional claim with prejudice. The district court first determined that Plaintiffs lacked standing. Alternatively, the district court found that "[e]ven if Plaintiffs possessed Article III standing, dismissal is still appropriate because Plaintiffs have failed to allege facts that state a cognizable legal theory." The district court reasoned that the complaint failed to allege facts that could plausibly support the conclusion that the monument conflicted with the executive branch's foreign policy. Plaintiffs timely appeal.

II. Standard of Review

"The district court's determination whether a party has standing, and whether there is subject matter jurisdiction, is reviewed de novo." *Hajro v. U.S. Citizenship & Immigration Servs.*, 811 F.3d 1086, 1098 (9th Cir. 2016). "We review denovo a district court's dismissal for failure to state a claim under Rule 12(b)(6)." *Harkonen v. U.S. Dep't of Justice*, 800 F.3d

---

[1] Plaintiffs also claim that the installation of the monument violates the Glendale Municipal Code. The district court declined to exercise supplemental jurisdiction over this claim and dismissed it without prejudice.

1143, 1148 (9th Cir. 2015). "We may affirm the district court's dismissal on any ground that is supported by the record, whether or not the district court relied on the same ground or reasoning ultimately adopted by this court." *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1121 (9th Cir. 2013).

III. Discussion

A. Standing

We must first determine whether Plaintiffs have standing to pursue their preemption claim. To establish Article III standing, Plaintiffs must demonstrate "(1) the existence of an injury-in-fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1043 (9th Cir. 2015). "In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *Allen v. Wright*, 468 U.S. 737, 751-52 (1984).[2]

Mera is a Japanese-American resident of Los Angeles. Mera "disagrees with and is offended by the position espoused by Glendale" through the monument. Mera "would like to use Glendale's Central Park and its Adult Recreation Center" but now "avoids doing

---

[2] While this appeal was pending, Plaintiffs notified us that Gingery had died. As the parties agree, Gingery's claim for injunctive and declaratory relief is therefore moot. *See Kennerly v. United States*, 721 F.2d 1252, 1260 (9th Cir. 1983).

so." Furthermore, "the presence of the Public Monument diminishes Mera's enjoyment of the Central Park and its Adult Recreation Center."

Mera's allegations parallel those of other plaintiffs, particularly in Establishment Clause and environmental cases, who have satisfied the injury-in-fact requirement by alleging that their use and enjoyment of public land has been impaired. In the context of challenges to government-sponsored displays of religion on public property, we "have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact." *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004); *see also Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) (holding that a plaintiff satisfied the injury-in-fact requirement by alleging that he was "offended" by the presence of a cross on public property, which he "otherwise would visit" but instead "avoids"). Similarly, in environmental cases, plaintiffs generally satisfy the injury-in-fact requirement by alleging that they are less able to use land affected by a defendant's conduct. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 182-83 (2000) (holding that plaintiffs who "would use" allegedly polluted areas located several miles from their homes, but "refrained" from doing so, had established injury in fact); *Nat. Res. Def. Council v. EPA*, 542 F.3d 1235, 1245 (9th Cir. 2008) (injury in fact established where plaintiffs alleged that their "use and enjoyment" of certain waterways "has been diminished" due to pollution). Although Mera asserts neither an Establishment Clause nor environmental claim, cases from these contexts may properly guide our evaluation of his alleged injury. *See Valley Forge Christian Coll.*

v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 488 (1982) (rejecting the argument that Establishment Clause cases create any "special exceptions" to the requirements of Article III standing).

Consistent with these precedents, we conclude that Mera's "inability to unreservedly use" Glendale's Central Park constitutes an injury in fact for purposes of Article III standing. *Buono*, 371 F.3d at 547. Like the Establishment Clause plaintiffs in *Ellis* and *Buono*, Mera allegedly "avoids" using certain public land, which he has previously visited and "would like to use" again, because he is "offended" by the government-sponsored display it contains. *See id.* at 546-47; *Ellis*, 990 F.2d at 1523. And like the plaintiffs in environmental cases, Mera has alleged both that he avoids public land that he would like to use again, and that his enjoyment of the park and the park's facilities has been "diminshe[d]." *See Laidlaw*, 528 U.S. at 182-83; *Nat. Res. Def. Council*, 542 F.3d at 1245. These allegations satisfy the injury-in-fact requirement.

Mera's injury is also "fairly traceable to the challenged action" of Glendale. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation and alterations omitted). The complaint alleges that Glendale "approved the installation" of the monument, which was unveiled to the public three weeks later. Mera avoids using Glendale's Central Park and its Adult Recreation Center "as a result of his alienation due to the Public Monument." These allegations "establish a line of causation" between Glendale's actions in approving the installation of the monument and Mera's alleged harm from the presence of the

monument in the park. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (citation omitted).

Finally, Mera has demonstrated "that a favorable decision is likely to redress" his injury. *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 784 (9th Cir. 2008). If Glendale is ordered to remove the monument from the park, Mera likely would not feel "alien-at[ed] due to the Public Monument" or need to avoid using the park. Therefore, Mera has satisfied the redressability requirement of Article III standing.

In sum, we conclude that Mera has Article III standing, and the district court erred in concluding otherwise.[3] If Plaintiffs truly lacked standing, the district court would not have had jurisdiction to reach the merits of their complaint. *See Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1106 (9th Cir. 2006). However, because we conclude that Mera does have standing, we may proceed to consider the district court's determination that Plaintiffs failed to state a claim upon which relief may be granted. *See, e.g., Cal. ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 787 (9th Cir. 2014) (disagreeing with the district court's finding that plaintiffs lacked standing, but nonetheless affirming the judgment); *Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1031 (D.C. Cir. 2003) (disagreeing with the district court's finding

---

[3] Because Mera has standing and "the presence in a suit of even one party with standing suffices to make a claim justiciable," we need not address whether GAHT-US satisfies the requirements for organizational standing. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981 (9th Cir. 2013) (citation omitted).

that plaintiff lacked standing but proceeding to the merits of the dispute).

B. Failure to State a Claim

The district court concluded that Plaintiffs had failed to state a claim that Glendale's installation of the Comfort Women monument is preempted under the foreign affairs doctrine. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause). Viewing the complaint's factual allegations in the light most favorable to Plaintiffs, we conclude that Glendale's installation of the monument concerns an area of traditional state responsibility and does not intrude on the federal government's foreign affairs power. We therefore agree with the district court that Plaintiffs have not plausibly claimed that Glendale's actions are preempted.

It is well established that the federal government holds the exclusive authority to administer foreign affairs. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012) (en banc); *see also United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."). Under the foreign affairs doctrine, state laws that intrude on this exclusively federal power are preempted, under either the doctrine of conflict preemption or the doctrine of field preemption. *Movsesian*, 670 F.3d at 1071.[4] Under the doctrine of conflict preemption, a

[4] Municipalities are subject to the same rules of preemption as the states. *See Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the

state action must yield to federal executive authority where "there is evidence of clear conflict between the policies adopted by the two." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003). Under the doctrine of field preemption, even in the absence of any express federal policy, a state action may be preempted where (1) its "real purpose" does not concern an area of traditional state responsibility, and (2) it intrudes on the federal government's foreign affairs power. *Movsesian*, 670 F.3d at 1074-75. Here, Plaintiffs do not argue that Glendale's installation of the monument conflicts with the federal government's policy on the Comfort Women dispute; indeed, the complaint alleges that the United States has "consistently sought to avoid" taking a position on the issue. Instead, Plaintiffs invoke the doctrine of field preemption.

Applying the doctrine of field preemption, we have found that a state or local government is more likely to exceed the limits of its power when it creates remedial schemes or regulations to address matters of foreign affairs. In *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010), for example, we held that a California statute, which extended the statute of limitations for civil actions to recover looted Holocaust-era artwork, was preempted because the statute would often require courts to review the reparation decisions of foreign nations, and thus intruded on the federal government's power "to make and resolve war." *Id.* at 965-68. More recently, in *Movsesian*, our Court, sitting en banc, concluded that a California statute, which vested California courts

---

field affecting foreign relations be left entirely free from local interference.").

with jurisdiction over certain insurance claims brought by "Armenian genocide victim[s]" and extended the statute of limitations for those claims, intruded on the field of foreign affairs. 670 F.3d at 1076-77. We explained that the California statute not only "expresses a distinct political point of view on a specific matter of foreign policy," but also "subject[s] foreign insurance companies to lawsuits in California" and would require courts applying the statute to engage in "a highly politicized inquiry into the conduct of a foreign nation." *Id.* at 1076.

What we have not considered, however, is the extent to which a state or local government may address foreign affairs through expressive displays or events, rather than through remedies or regulations. In *Movsesian*, for example, we emphasized that the law at issue was not "merely expressive" and declined to "offer any opinion about California's ability to express support for Armenians by, for example, declaring a commemorative day." *Id.* at 1077 & n.5; *see also Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 n.18 (1st Cir. 1999) (holding that the Massachusetts Burma law, which restricted the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma, was preempted but noting that "[w]e do not consider here whether Massachusetts would be authorized to pass a resolution condemning Burma's human rights record but taking no other action with regard to Burma"), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Here, we confront a variant of the issue we left open in *Movsesian*: whether the Supremacy Clause preempts a local government's expression, through a public monument, of

a particular viewpoint on a matter related to foreign affairs. Under the circumstances of this case, we conclude that it does not.

First, Glendale's establishment of a public monument to advocate against "violations of human rights" is well within the traditional responsibilities of state and local governments. "Governments have long used monuments to speak to the public." *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). In addition, "[c]ities, counties, and states have a long tradition of issuing pronouncements, proclamations, and statements of principle on a wide range of matters of public interest, including other matters subject to preemption, such as foreign policy and immigration." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996). For example, local governments have established memorials for victims of the Holocaust[5] and the Armenian genocide,[6] and leaders of local governments have publicly taken positions on matters of foreign affairs, from South African apartheid in the 1980s[7] to the recent actions of Boko Haram.[8] Here, by dedicating a local monument to the

---

[5] *See Holocaust Memorials*, Ctr. for Holocaust & Genocide Stud., Univ. of Minn., http://ittybittyurl.com/2EI6 (last visited July 27, 2016).

[6] *See Monument at Bicknell Park in Montebello, California*, Armenian Nat'l Inst., http://ittybittyurl.com/2EI3 (last visited July 27, 2016).

[7] *See* Bill Boyarsky, *Mayor's Blast at Apartheid Affirms Appeal to Blacks,* L.A. Times, Jan. 20, 1985, http://ittybittyurl.com/2EI4.

[8] *See* Press Release, City of Atlanta, Statement of Mayor Kasim Reed on the Kidnapped Nigerian Girls (May 7, 2014), *available at* http://ittybittyurl.com/2EI5.

plight of the Comfort Women in World War II, Glendale has joined a long list of other American cities that have likewise used public monuments to express their views on events that occurred beyond our borders.

In Plaintiffs' view, however, Glendale's "real purpose" is to insert itself into foreign affairs. We disagree. According to the monument's plaque, Glendale's self-stated purposes are: (i) to preserve the "memory" of the Comfort Women, (ii) to "celebrate" Glendale's proclamation of a "Comfort Women Day" and the House of Representatives' decision to pass a resolution addressing historical responsibility for the Comfort Women, and (iii) to express "sincere hope" that "these unconscionable violations of human rights shall never recur." These purposes—memorializing victims and expressing hope that others do not suffer a similar fate—are entirely consistent with a local government's traditional function of communicating its views and values to its citizenry. Moreover, even if Glendale's purpose was, as one City Council member stated, to "put the city of Glendale on the international map," this purpose does not conflict with the role local governments have traditionally played in public discourse related to foreign affairs. *Cf. Farley v. Healey*, 431 P.2d 650, 653 (Cal. 1967) ("Even in matters of foreign policy it is not uncommon for local legislative bodies to make their positions known."). Therefore, Glendale's "real purpose" in installing the Comfort Women monument concerns "an area of traditional state responsibility." *Movsesian*, 670 F.3d at 1075.

Second, even if Glendale were acting outside an area of traditional state responsibility, Plaintiffs have not plausibly alleged that Glendale's actions "intrude[] on the federal government's foreign affairs

power." *Id.* at 1074. "To intrude on the federal government's foreign affairs power, a [state's action] must have more than some incidental or indirect effect on foreign affairs." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013) (citation omitted). While Plaintiffs broadly assert that the monument "threatens to negatively affect U.S. foreign relations with Japan," Plaintiffs do not support this assertion with specific allegations that Glendale's actions have had, or are likely to have, any appreciable effect on foreign affairs. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). At most, Plaintiffs allege that various Japanese officials have expressed disapproval of the monument. However, Plaintiffs have not further alleged that this disapproval has in any way affected relations between the United States and Japan. In addition, Plaintiffs do not allege that the federal government has expressed any view on the monument—much less complained of interference with its diplomatic agenda. Thus, Plaintiffs have failed to plausibly allege that Glendale's installation of the monument has had "more than some incidental or indirect effect on foreign affairs." *Cassirer*, 737 F.3d at 617 (citation omitted).

Moreover, in contrast to state actions we have found preempted, Glendale has taken no action that would affect the legal rights and responsibilities of any individuals or foreign governments. For example, Glendale has not, as in *Von Saher* or *Movsesian*, created a cause of action for victims affected by the Comfort Women program, or extended the statute of limitations for any existing cause of action that might provide relief to these individuals. *See Movsesian*, 670 F.3d at 1076-77; *Von Saher*, 592 F.3d at 965-68. Nor

has Glendale imposed any regulatory restrictions on the exchange of goods manufactured by parties who may have played a role in the Comfort Women program. *See Crosby*, 530 U.S. at 373-74. Rather, by erecting a symbolic display commemorating what it views as a historical tragedy, Glendale has appropriately exercised the expressive powers of a local government and stopped short of interfering with the federal government's foreign affairs power.

Glendale's installation of the Comfort Women monument concerns an area of traditional state responsibility and does not intrude on the federal government's foreign affairs power. As a result, Plaintiffs have failed to state a claim that Glendale's actions are preempted. *See Movsesian*, 670 F.3d at 1074.[9]

C. Leave to Amend

Finally, Plaintiffs argue that the district court abused its discretion by dismissing their complaint

---

[9] As an alternative basis for affirming the district court, Judge Korman concludes that Plaintiffs lack a cause of action under 42 U.S.C. § 1983. In Judge Korman's view, the foreign affairs provisions of the Constitution do not create an individual right enforceable under Section 1983. He may very well be correct. However, we decline to address this issue of first impression for our Court. *See Gerling Glob. Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803, 810-11 (9th Cir.), *as amended on denial of reh'g*, 410 F.3d 531 (9th Cir. 2005). It was not raised by either party to the district court or before us, and the district court did not rule on this basis. "[W]e are hesitant to address an issue without the benefit of any briefing from the parties." *Bledsoe v. Bledsoe (In re Bledsoe)*, 569 F.3d 1106, 1113 (9th Cir. 2009). In any event, we need not reach the issue in this appeal, for "[w]e may affirm the district court's dismissal on any ground that is supported by the record." *Hartmann*, 707 F.3d at 1121.

without granting leave to amend. "Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008). Before the district court, Plaintiffs did not request leave to amend, and the district court found that no amendment could cure the complaint's deficiencies. On appeal, Plaintiffs have not identified any additional allegations that could save their complaint from dismissal. Accordingly, we conclude that the district court was within its discretion to dismiss Plaintiffs' complaint without leave to amend.

IV. Conclusion

The Constitution places important limits on a municipality's ability to engage in matters related to foreign affairs. We conclude that Glendale has not exceeded those limits by installing a monument to commemorate the Comfort Women. Therefore, the district court properly dismissed Plaintiffs' preemption claim.

AFFIRMED.

CONCURRING OPINION OF JUSTICE KORMAN (AUGUST 4, 2016)

While I agree that Koichi Mera, one of the plaintiffs, meets the "irreducible constitutional minimum" requirements to allege Article III standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), and do not take issue with the manner in which the majority resolves the merits of the appeal, I write separately to suggest that the plaintiffs have not alleged a valid cause of action that anchors their claim of foreign affairs preemption. Simply mouthing the words foreign affairs preemption does not do it. The plaintiffs assert only in the vaguest manner that their complaint is brought under 42 U.S.C. § 1983. Nevertheless, Section 1983 cannot support their cause of action. Nor is an equitable cause of action to restrain regulatory action in violation of the Constitution available here.

I. Section 1983

The availability of a cause of action under Section 1983 depends upon whether a plaintiff has alleged "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983; *see also Golden State Transit Corp. v. City of Los Angeles (Golden State II)*, 493 U.S. 103, 105 (1989). The right being deprived here cannot be found in the Supremacy Clause, which "is not the 'source of any federal rights.'" *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (quoting *Golden State II*, 493 U.S. at 107); *see also Associated Gen. Contractors, San Diego Chapter, Inc., Apprenticeship & Training Tr. Fund v. Smith*, 74 F.3d 926, 931 (9th Cir. 1996) ("[P]reemption of state law under the

Supremacy Clause—being grounded not on individual rights but instead on considerations of power—will not [itself] support an action under section 1983 . . . ." (quoting *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1394 (9th Cir. 1987)); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir. 1985) ("We believe that § 1983 was not intended to encompass those constitutional provisions which allocate power between the state and federal government.").

Moreover, neither the Supreme Court nor the Ninth Circuit has ever recognized that the foreign affairs provisions of the Constitution, which certainly do not confer any rights on their face, *see, e.g.*, U.S. Const. art. II, § 2, cls. 1-2; *id.* art. I, § 8, cls. 1, 3, 4, 10-14, contain an implicit individual right. Indeed, in *Gerling Global Reinsurance Corporation of America v. Garamendi*, 400 F.3d 803 (9th Cir. 2005), we observed that the district court "may have been correct" in the "abstract" when it concluded that the foreign affairs power did not "implicate a right, privilege or immunity secured by the Constitution or laws of the United States," *id.* at 810. Nevertheless, because we concluded they were prevailing parties for reasons that need not be discussed, the plaintiffs were entitled to an award of counsel fees pursuant to 42 U.S.C. § 1988. While we did not definitively resolve the issue, we "assum[ed] that the foreign affairs power does not confer rights within the meaning of § 1983." *Gerling*, 400 F.3d at 807. Judge Graber, who concurred in the result, directly addressed the issue. She observed without qualification that "the foreign affairs power, like the Supremacy Clause, creates no individual rights enforceable under 28 U.S.C. § 1983." *Id.* at 811.

Because I agree that the foreign affairs provisions create no individual rights, the plaintiffs lack a cause of action pursuant to 42 U.S.C. § 1983.

II. Equitable Cause of Action

Unlike Section 1983, the availability of an equitable cause of action to enjoin purportedly unconstitutional conduct does not necessarily rely upon the fact that a particular constitutional provision confers an individual right on the plaintiff *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). Instead, in a preemption case, the availability of such a cause of action hinges on the plaintiff's being subject to an enforcement or other regulatory action. The Supreme Court has long recognized that a plaintiff may bring a suit to enjoin unconstitutional regulatory conduct. Courts often cite as the forebear of that type of equitable action the case of *Ex parte Young*, 209 U.S. 123 (1908). *See, e.g., Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002). *Young* was not a preemption case; it involved a claim by shareholders of a railroad that a state law regulating railroad rates violated, *inter alia*, the Fourteenth Amendment's Due Process Clause. Nevertheless, the *Young* Court held that "individuals who, as officers of the state, . . . threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." 209 U.S. at 155-56.

The Supreme Court has applied that holding in preemption cases, making it clear that, in such cases, the equitable cause of action is available only to enjoin acts of regulation. *See Armstrong*, 135 S. Ct. at 1384

("[W]e have long recognized [that] if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted."); *see also, e.g., Ray v. Atl. Richfield Co.*, 435 U.S. 151, 155 (1978); *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255-56 (2011). In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), the Supreme Court reiterated the basis for these types of suits: "A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve," *id.* at 96 n.14; *see also Golden State II*, 493 U.S. at 113 (Kennedy, J., dissenting) ("[A] private party can assert an immunity from state or local regulation on the ground that the Constitution . . . allocate[s] the power to enact the regulation to the National Government, to the exclusion of the States."); *cf. Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1413 (9th Cir. 1996) ("If a municipality's action [in a case asserting preemption by the National Labor Relations Act] does not rise to the level of regulation, it is not preempted."). Although the *Shaw* Court dressed the inquiry in the language of "jurisdiction," rather than of "cause of action," the two inquiries are functionally the same in asking why a plaintiff should be allowed to bring the suit in federal court. Nevertheless, while the questions are intertwined, the Supreme Court recently suggested that the cause-of-action inquiry is not jurisdictional. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014).

Moreover, the Supreme Court's cases dealing with preemption specifically in the foreign affairs domain do not suggest the availability of an equitable cause of action outside of the regulatory context. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 409-12 (2003) (insurance companies brought action alleging preemption of California law requiring disclosure of policies issued to persons in Europe in effect between 1920 and 1945); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 367, 370-71 (2000) (companies who did business with Burma brought action alleging preemption of a Massachusetts statute, the purpose of which was to prevent or discourage them from transacting business with Burma); *Zschernig v. Miller*, 389 U.S. 429, 432-33 (1968) (striking down state law regulating the inheritance rights of foreign beneficiaries of Oregon residents because it did so in a way that constituted "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"). Nor do our cases in this area suggest a broader cause of action. *See, e.g., Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1070-71, 1077 (9th Cir. 2012) (en banc) (foreign insurance companies could raise defensively a challenge to a California law that subjected them to suits in California "by overriding forum-selection provisions and greatly extending the statute of limitations for a narrowly defined class of claims" in a way that constituted an intrusion on the conduct of foreign policy); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957-59 (9th Cir. 2009) (similar); *Deutsch v. Turner Corp.*, 324 F.3d 692, 703, 716 (9th Cir. 2003) (similar).

In sum, this case involves a purely expressive, non-regulatory action by the City of Glendale that is not alleged to, and does not, implicate any right conferred by the Constitution or laws of the United States, the predicate for a Section 1983 cause of action. Moreover, because the conduct of the City of Glendale does not subject plaintiffs to an enforcement or other regulatory action, it does not come within the category of cases in which an equitable cause of action would be available to restrain conduct that touches on the power of the President or Congress in the area of foreign affairs.

ORDER OF THE DISTRICT COURT (AUGUST 4, 2014)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

MICHIKO SHIOTA GINGERY, ET AL.

v.

CITY OF GLENDALE, ET AL.

Case No. CV 14-1291 PA (AJWx)

Before: The Honorable Percy ANDERSON, United States District Judge

---

Before the Court are a Special Motion to Strike Pursuant to California Code of Civil Procedure section 425.16 ("Anti-SLAPP Motion") (Docket No. 19) and a Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or to Strike Pursuant to Rule 12(f) ("Motion to Dismiss") (Docket No. 20) filed by defendant City of Glendale ("Glendale" or "Defendant"). Defendant challenges the sufficiency of the Complaint filed by plaintiffs Michiko Shiota Gingery, Koichi Mera, and GAHT-US Corporation (collectively "Plaintiffs"). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds these matters are appropriate for decision without oral argument.

I. Background

This action concerns the installation of a monument in Glendale's Central Park. According to the Complaint, the monument was unveiled on July 30, 2013, and includes a 1,100 pound bronze statue of a young girl in Korean dress sitting next to an empty chair with a bird perched on her shoulder. Next to the statue is a plaque that reads, in part:

> In memory of more than 200,000 Asian and Dutch women who were removed from their homes in Korea, China, Taiwan, Japan, the Philippines, Thailand, Vietnam, Malaysia, East Timor and Indonesia, to be coerced into sexual slavery by the Imperial Armed Forces of Japan between 1932 and 1945.
>
> And in celebration of proclamation of "Comfort Women Day" by the City of Glendale on July 30, 2012, and of passing House Resolution 121 by the United States Congress on July 30, 2007, urging the Japanese Government to accept historical responsibility for these crimes.
>
> It is our sincere hope that these unconscionable violations of human rights never recur.

(Compl. ¶ 11.)

Plaintiffs filed this action for declaratory and injunctive relief on February 20, 2014. The Complaint alleges two causes of action. In their first claim, which Plaintiffs label a claim for "Unconstitutional Interference with Foreign Affairs Power," Plaintiffs allege that Glendale's erection of the monument

"interferes with the Executive Branch's primary authority to conduct foreign relations by disrupting foreign policy as to the resolution of the historical debate concerning comfort women. The Public Monument also violates the Supremacy Clause." (Compl. ¶ 59.) According to the Complaint, by installing the Comfort Women monument, Glendale "has taken a position in the contentious and politically-sensitive international debate concerning the proper historical treatment of the former comfort women. More specifically, given the inflammatory language used in the plaque that is prominently featured alongside the statue, Glendale has taken a position at odds with the expressed position of the Japanese Government." (Compl. ¶ 61.) In support of their assertion that this Court possesses subject matter jurisdiction, the Complaint alleges that this action arises under "42 U.S.C. § 1983; the foreign affairs powers of the United States, U.S. Const. art. II, sec. 1, cl. 1, sec. 2, cl. 1; sec. 2, cl. 2; and sec. 3; and the Supremacy Clause, U.S. Constitution, art. VI, cl. 2." (Compl. ¶ 1.) Plaintiffs' second cause of action asserts a supplemental state law claim under the Glendale Municipal Code alleging that Glendale's city council failed to comply with Robert's Rules of Order when it approved the placement of the monument.

According to the Complaint, plaintiff Michiko Shiota Gingery is a resident of Glendale who was born in Japan and is now a naturalized citizen of the United States. Plaintiff GAHT-US Corporation ("GAHT-US") is a non-profit corporation organized under the laws of California. The purpose of GAHT-US is to "provide accurate and fact-based educational resources to the public in the U.S., including within California and Glendale, concerning the history of World War II and

related events, with an emphasis on Japan's role." (Compl. ¶ 7.) Koichi Mera is a Japanese-American who resides in the City of Los Angeles and is the President of GAHT-US. The Complaint alleges that Gingery, Mera, and the members of GAHT-US avoid using Glendale's Central Park where the monument is located because they are "offended by the Public Monument's pointed expression of disapproval of Japan and the Japanese people." (Compl. ¶ 6.)

Both parties filed Requests for Judicial Notice in which they seek to have the Court take judicial notice of various historical facts and governmental statements concerning the controversies surrounding the acknowledgment of responsibility for the treatment of the Comfort Women and reaction by some within the Japanese government to the monument. Although neither party has objected to the other party's Request for Judicial Notice, the materials of which the parties have requested the Court to take judicial notice are not necessary or relevant to the Court's resolution of the pending motions. The Court therefore denies the parties' Requests for Judicial Notice.

The Court has also received two Ex Parte Applications for Leave to Appear as Amicus Curiae. The first of the Amicus Applications was filed by The Global Alliance for Preserving the History of WW II in Asia (the "Global Alliance") (Docket No. 39). The Global Alliance seeks leave to file a proposed Amicus Brief containing historical information concerning the Comfort Women. The second Amicus Application was filed by the Korean-American Forum of California (Docket No. 45) and includes declarations from two individuals detailing their experiences during World

War II as Comfort Women. Although the Court has reviewed the materials submitted by the Amicus applicants, the Court has concluded that none of the information provided by the proposed Amicus applicants is necessary for the Court's disposition of the present motions. The Court therefore has not relied on any of the information contained in the Amicus applications in reaching its decision concerning the pending motions. The Ex Parte Applications for Leave to Appear as Amicus Curiae are therefore denied without prejudice.

II. Analysis

In its Anti-SLAPP Motion, Defendant contends that the Complaint's first claim alleging violations of the United States Constitution does not allege a viable federal claim and is therefore susceptibly to a Motion to Strike pursuant to California Code of Civil Procedure section 425.16. Although the Complaint's first claim could have been crafted to more clearly indicate that it is brought pursuant to 42 U.S.C. § 1983, the Court concludes that, at a minimum, Plaintiffs' first claim is intended to be a federal claim, originally filed in federal court, and that California Code of Civil Procedure section 425.16 does not apply to that claim. *See Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2009) ("[T]he anti-SLAPP statute does not apply to federal causes of action."). Because this Court's subject matter jurisdiction is based on the Complaint's first claim, and that claim is not susceptible to an anti-SLAPP Motion, the Court will first address Glendale's Motion to Dismiss.

In its Motion to Dismiss, Glendale asserts, pursuant to Federal Rule of Civil Procedure 12(b)(1),

that Plaintiffs lack standing to pursue their claim alleging violations of the United States Constitution's foreign affairs powers and Supremacy Clause. Glendale additionally argues, pursuant to Federal Rule of Civil Procedure 12(b)(6), that Plaintiffs' constitutional claim fails to state a claim upon which relief can be granted, presents a political question over which the Court should not interfere, and impermissibly infringes on Glendale's First Amendment rights.

A. Lack of Standing

Article III of the United States Constitution requires that a litigant have standing to invoke the power of a federal court. Because Article III's standing requirements limit subject matter jurisdiction, a lawsuit is properly challenged by a rule 12(b)(1) motion to dismiss. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). For the purpose of ruling on a motion to dismiss for lack of standing, the Court must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

To satisfy Article III standing, a plaintiff must show that she has suffered an "'injury in fact,'" that there is a "causal connection between the injury," and the defendant's complained-of conduct, and that it is likely "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136-37, 119 L. Ed. 2d 351 (1992); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). To demonstrate an "injury in fact," a plaintiff must

establish an "invasion of a legally protected interest which is (a) concrete and particularized [citations] and (b) 'actual or imminent, not "conjectural" or 'hypothetical.'" *Lujan*, 504 U.S. at 560. To meet this test, the "line of causation" between the alleged conduct and injury must not be "too attenuated," and "the prospect of obtaining relief from the injury" must not be "too speculative." *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011).

Plaintiffs assert that their avoidance of Glendale's Central Park resulting from their disagreement and distress over the content of the Comfort Women monument is a sufficient injury in fact to confer standing upon them to assert their federal claim. But that injury in fact has no causal connection to the constitutional claims alleged in the Complaint. The fact that local residents feel disinclined to visit a local park is simply not the type of injury that can be considered to be in the "line of causation" for alleged violations of the foreign affairs power and Supremacy Clause. That is, even if Glendale's placement of the monument did violate the Constitution's delegation of foreign affairs powers to the Executive Branch, and in some way upset the Supremacy Clause's constitutional balance between state and federal authority, the relationship between that legal harm and the offense Plaintiffs have taken to the existence of the monument is simply too attenuated to confer standing on Plaintiffs to pursue the federal claim they have asserted in this action. *See Caldwell v. Caldwell*, 545 F.3d 1126, 1133 (9th Cir. 2008) ("Caldwell's offense is no more than an 'abstract objection' to how the University's website presents the subject. . . . Accordingly, we believe there

is too slight a connection between Caldwell's generalized grievance, and the government conduct about which she complains, to sustain her standing to proceed.").

Barnes-Wallace v. City of San Diego, 530 F.3d 776 (9th Cir. 2008), the case on which Plaintiffs principally rely to support their purported standing to pursue their claims, is readily distinguishable. *Barnes-Wallace* involved Establishment Clause and Equal Protection challenges brought on behalf of agnostic and lesbian parents to the City of San Diego's leasing of public land to an organization that excludes persons because of their religious and sexual orientations. The causal relationship between the presence of such an organization on public land as a deterrent to those plaintiffs' use and enjoyment of that public land, and the Establishment Clause and Equal Protection claims asserted in that action was far more direct than is the relationship between the alleged harms and Supremacy Clause and foreign affairs power claims pursued by the Plaintiffs in this action. *Id.* at 785-86 ("[T]he plaintiffs here are lesbians and agnostics, members of the classes of individuals excluded and publicly disapproved of by the Boy Scouts. They are not bystanders expressing ideological disapproval of the government's conduct."); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485, 102 S. Ct. 752, 765, 70 L. Ed. 2d 700 (1982) ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably

produced by observation of conduct with which one disagrees.").

Finally, Gingery's concern that the placement of the monument "presents the potential to disrupt the United States' strategic alliances with its closest East Asian allies, Japan and South Korea" (Compl. ¶ 6,) is not a sufficient injury in fact to confer standing. *See Lujan*, 504 U.S. at 575, 112 S. Ct. at 2143, 119 L. Ed. 2d 351 ("'It is an established principle . . . that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.'") (quoting *Ex parte Lévitt*, 302 U.S. 633, 634, 58 S. Ct. 1, 82 L. Ed. 493 (1937)). For all of the foregoing reasons, the Court concludes that Plaintiffs lack standing to pursue their federal claim.

B. Failure to State a Claim

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d

80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). *See, e.g., Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248–49 (9th Cir. 1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

However, in *Twombly*, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." *Twombly*, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." *Id.* at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002) ("'All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party.'") (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the

elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964–65 (internal quotations omitted). In construing the *Twombly* standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

Even if Plaintiffs possessed Article III standing, dismissal is still appropriate because Plaintiffs have failed to allege facts that state a cognizable legal theory. Plaintiffs have alleged no well-pleaded factual allegations that could plausibly support a conclusion that the Comfort Women monument in Glendale's Central Park, with a plaque expressing "sincere hope that these unconscionable violations of human rights never recur," violates the Supremacy Clause or foreign affairs powers. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421, 123 S. Ct. 2374, 2390, 156 L. Ed. 2d 376 (2003) ("The exercise of federal executive authority [over the conduct of foreign relations] means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two."). Plaintiffs' Complaint provides no well-pleaded allegations of the required "clear conflict" between the federal government's foreign relations policies concerning recognition of the plight of the Comfort

Women and Glendale's placement of the monument in its Central Park. *Id.* Indeed, as alleged in the Complaint, the plaque accompanying the statue cites to House Resolution 121, passed by Congress on July 30, 2007, "urging the Japanese Government to accept historical responsibility for these crimes." (Compl. ¶ 11.)

Any contrary conclusion would invite unwarranted judicial involvement in the myriad symbolic displays and public policy issues that have some tangential relationship to foreign affairs. For instance, those who might harbor some factual objection to the historical treatment of a state or municipal monument to the victims of the Holocaust could make similar claims to those advanced by Plaintiffs in this action. Neither the Supremacy Clause nor the Constitution's delegation of foreign affairs powers to the federal government prevent a municipality from acting as Glendale has done in this instance:

> Holding that cities are preempted under . . . federal law . . . from making pronouncements on matters of public interest . . . would mark an unprecedented and extraordinary intrusion on the rights of state and local governments. An inherent power of any sovereign government and one that is fundamental to any form of democracy is the ability to communicate with the citizenry. . . . Absent explicit direction from Congress, we are not willing to conclude that our federal government has chosen to adopt a rule that is so antithetical to fundamental principles of federalism and democracy.

Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1415 (9th Cir. 1996).

Glendale's placement of the Comfort Women monument in its Central Park does not pose the type of interference with the federal government's foreign affairs powers that states a plausible claim for relief. Instead, even according to the facts alleged in the Complaint, Glendale's placement of the statue is entirely consistent with the federal government's foreign policy. Plaintiffs have not asked for leave to amend the Complaint to cure the deficiencies identified by Defendant. Nor does the Court believe that any amendment could cure those deficiencies. The Court therefore concludes that Plaintiffs have failed to state a viable constitutional claim and that any amendment would be futile. As a result, the Court dismisses Plaintiffs' first claim with prejudice. *See Reddy v. Litton Industries, Inc.*, 912 F.2d 291, 296 (9th Cir. 1990). The Court declines to address Defendant's remaining arguments in support of its Motion to Dismiss.

C. Supplemental State Law Claim

The Court has supplemental jurisdiction over Plaintiff's remaining state law claim under 28 U.S.C. § 1367(a). Once supplemental jurisdiction has been established under § 1367(a), a district court "can decline to assert supplemental jurisdiction over a pendant claim only if one of the four categories specifically enumerated in section 1367(c) applies." *Exec. Software v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 24 F.3d 1545, 1555–56 (9th Cir. 1994). The Court may decline supplemental jurisdiction under § 1367(c) if: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the

claim or claims over which the district court has original jurisdiction, (3) the district court dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."

Here, the Court has dismissed the only claim over which it has original jurisdiction. Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claim. *See* 28 U.S.C. § 1367(c)(3). The Court therefore dismisses the Complaint's second claim without prejudice.

III. Conclusion

For all of the foregoing reasons, the Court concludes that Plaintiffs lack standing to pursue their first claim for violations of the United States Constitution's provisions concerning foreign affairs powers and the Supremacy Clause. The Court additionally determines that the Complaint's first claim also fails to state a claim upon which relief can be granted. The Court therefore dismisses the Complaint's first claim with prejudice. The Court declines to exercise supplemental jurisdiction over the Complaint's remaining state law claim and dismisses that claim without prejudice. Pursuant to 28 U.S.C. § 1367(d), this Order acts to toll plaintiffs' statute of limitations on their state law claim for a period of thirty (30) days, unless state law provides for a longer tolling period. Defendant's Anti-SLAPP Motion is denied as moot.

IT IS SO ORDERED.

JUDGMENT OF THE DISTRICT COURT (AUGUST 4, 2014)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHIKO SHIOTA GINGERY, KOICHI MERA, and GAHT-USA CORPORATION

Plaintiffs,

v.

CITY OF GLENDALE,

Defendant.

Case No. CV 14-1291 PA (AJWx)

Before: Percy ANDERSON, United States District Judge.ss

Pursuant to the Court's August 4, 2014 Minute Order granting the Motion to Dismiss filed by defendant City of Glendale ("Defendant"), which dismissed the sole federal claim asserted by plaintiffs Michiko Shiota Gingery, Koichi Mera, and GAHT-USA Corporation (collectively "Plaintiffs") with prejudice, and declined to exercise supplemental jurisdiction over Plaintiffs' remaining state law claim and dismissed that claim without prejudice,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' federal constitutional claim for violation of the foreign affairs power and

Supremacy Clause is dismissed with prejudice and Plaintiffs' remaining state law claim is dismissed without prejudice.

[. . . .]

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiffs take nothing and that Defendant shall have its costs of suit.

IT IS SO ORDERED.

/s/ Percy Anderson
United States District Judge

DATED: August 4, 2014

ORDER OF THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (OCTOBER 13, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHIKO SHIOTA GINGERY, an individual; ET AL.,

Plaintiffs-Appellants,

v.

CITY OF GLENDALE, a municipal corporation,

Defendant-Appellee.

No. 14-56440

D.C. No. 2:14-cv-01291-PA-AJW
Central District of California, Los Angeles

Before: REINHARDT, and WARDLAW, Circuit Judges, and KORMAN,* District Judge.

Judges Reinhardt and Wardlaw voted to deny the petition for rehearing en banc. Judge Korman recommended denying it.

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (FEBRUARY 20, 2014)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHIKO SHIOTA GINGERY, an individual, KOICHI MERA, an individual, GAHT-US CORPORATION, a California non-profit corporation

Plaintiffs,

v.

CITY OF GLENDALE, a municipal corporation, SCOTT OCHOA, in his capacity as Glendale City Manager,

Defendants.

Case No. 2:14-cv-1291

Plaintiffs Michiko Shiota Gingery, Koichi Mera and GAHT-US Corporation ("GAHT"), allege as follows:

JURISDICTION

1. This action arises under, *inter alia*, 42 U.S.C. § 1983; the foreign affairs powers of the United States, U.S. Const. art. II, sec. 1, cl. 1; sec. 2, cl. 1; sec. 2, cl. 2; and sec. 3; and the Supremacy Clause, U.S. Constitution, art. VI, cl. 2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3),

and the power to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202. This Court also has supplemental jurisdiction under 28 U.S.C. § 1367 over all claims that are so related to claims in the action within original jurisdiction such that they form part of the same case or controversy.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because the conduct complained of occurred, is occurring, and/or will continue to occur in Glendale, California, within this judicial district. Defendant City of Glendale ("Glendale") maintains its offices in Glendale, California. Defendant Scott Ochoa ("Ochoa"), who is sued in his official capacity as the City Manager of Glendale, maintains his offices in Glendale, California.

NATURE OF THE ACTION

3. Plaintiffs seek injunctive and declaratory relief relating to the presence of a monument authorized by Glendale and Ochoa and condemning the nation of Japan for its involvement with and treatment of what have come to be known as "comfort women." The monument is located on public land in a publicly owned park in Glendale known as Central Park, located at 201 South Colorado St., Glendale, CA 91205 (the "Public Monument"). Plaintiffs seeks this relief on the grounds that the Public Monument exceeds the power of Glendale, infringes upon the federal government's power to exclusively conduct the foreign affairs of the United States, and violates the Supremacy Clause of the U.S. Constitution.

4. The Public Monument threatens to negatively affect U.S. foreign relations with Japan, one of this nation's most important allies, and is inconsistent

with the foreign policy of the United States. That policy is to encourage the relevant foreign nations with direct involvement in the historic events involving comfort women, including the governments of Japan and the Republic of Korea ("South Korea"), to resolve the debate relating to comfort women between or among themselves without the involvement of the United States. The proper historical characterization of the events in issue and the precise role of national governments in those acts have been the subject of discussions and negotiations between the governments of Japan and South Korea for decades, and remain an active topic of political debate.

5. The emplacement of the Public Monument also violates Glendale's Municipal Code.

PARTIES

6. Plaintiff Michiko Shiota Gingery ("Gingery") is a long-time resident of Glendale. Gingery lives in the vicinity of Central Park and the Public Monument. Gingery is a founding member of Glendale's Sister City Committee, a committee created to develop and administer Glendale's Sister City Program. In this capacity, Gingery made significant contributions to Glendale's establishment of a Sister City relationship with the City of Higashiosaka (at the time called Hiraoka), Japan, Glendale's first Sister City. Gingery was born in Japan, and is now a naturalized U.S. citizen. As a Glendale resident of Japanese heritage, Gingery believes the Public Monument presents an unfairly one-sided portrayal of the historical and political debate surrounding comfort women and presents the potential to disrupt the United States'

strategic alliances with its closest East Asian allies, Japan and South Korea. She also believes the emplacement of the Public Monument represents a significant obstacle in maintaining friendly relations among Glendale's sister-cities, the primary objective of the Sister City Program. Gingery suffers feelings of exclusion, discomfort, and anger because of the position espoused by her city of residence through its display and endorsement of the Public Monument. Gingery would like to use Glendale's Central Park and the Adult Recreation Center located within Central Park. But she now avoids doing so because she is offended by the Public Monument's pointed expression of disapproval of Japan and the Japanese people. In addition, the presence of the Public Monument diminishes Gingery's enjoyment of the Central Park and its Adult Recreation Center.

7. Plaintiff GAHT-US Corporation ("GAHT-US") is a non-profit public benefit corporation organized under the laws of the State of California. The purpose of GAHT-US is to provide accurate and fact-based educational resources to the public in the U.S., including within California and Glendale, concerning the history of World War II and related events, with an emphasis on Japan's role. GAHT-US has undertaken this goal in an effort to enhance a mutual historical and cultural understanding between and among the Japanese and American people. Given its mission, GAHT-US believes that the Public Monument advances an unfairly biased portrayal of the Japanese government's purported involvement with comfort women during the Second World War. Individual members of GAHT-US reside in Glendale and nearby cities. GAHT-US's members suffer feelings of exclusion, discomfort, and anger by

the continued presence of the Public Monument, and the controversial and disputed stance on the debate surrounding comfort women that it perpetuates. Although GAHT-US members would like to use Glendale's Central Park and its Adult Recreation Center, they no longer intend to do so as a result of their distress due to the Public Monument. In addition, the presence of the Public Monument diminishes GAHT-US members' enjoyment of the Central Park and its Adult Recreation Center.

8. Plaintiff Koichi Mera ("Mera") is a Japanese-American resident of the City of Los Angeles and the President of GAHT-US. Mera disagrees with and is offended by the position espoused by Glendale through the Public Monument and its pointed condemnation of the Japanese people and government. Although Mera would like to use Glendale's Central Park and its Adult Recreation Center, as a result of his alienation due to the Public Monument, he avoids doing so. In addition, the presence of the Public Monument diminishes Mera's enjoyment of the Central Park and its Adult Recreation Center.

9. Defendant Glendale is a political subdivision of the State of California operating under a charter authorized by the State of California that empowers it to pass lawful ordinances and to govern and administer municipal activities within Glendale's city limits, with authority to be sued in its own name. Glendale's governing authority consists of city council, composed of five city council members (the "City Council"), one of whom also serves as the mayor. The City Council makes policy decisions for Glendale, including decisions regarding the use of public lands.

10. At all relevant times hereto, defendant Ochoa has been the duly appointed City Manager of Glendale with supervisorial responsibility over the day-to-day administration of Glendale's various departments and staff, including but not limited to Glendale's Department of Community Services and Parks, Department of Public Works, Department of Community Development, and Department of Management Services; these departments in one or another manner are involved in the management and operation of Central Park and/or the Public Monument. Ochoa effectively acts as, and is publicly held out to operate as, Glendale's Chief Executive Officer. At all relevant times with respect to the Public Monument, Ochoa acted under color of state law and with the power and authority granted to him by the State of California and Glendale to deprive Plaintiffs of their federal constitutional rights, for which Plaintiffs seek injunctive and declaratory relief.

FACTUAL BACKGROUND

Glendale's Public Monument

11. At a Special Meeting on July 9, 2013, the City Council approved the installation of the Public Monument, described as "a Korean Sister City 'Comfort Woman' Peace Monument," on a substantial portion of public land immediately adjacent to the Adult Recreation Center Plaza in Central Park. The Public Monument was unveiled 21 days later, on July 30, 2013. The Public Monument is a 1,100-pound bronze statue of a young girl in Korean dress sitting next to an empty chair with a bird perched on her shoulder. Integral to and alongside the statue is a permanent bronze plaque that reads:

I was a sex slave of Japanese military

- Torn hair symbolizes the girl being snatched from her home by the Imperial Japanese Army.
- Tight fists represent the girl's firm resolve for a deliverance of justice.
- Bare and unsettled feet represent having been abandoned by the cold and unsympathetic world.
- Bird on the girl's shoulder symbolizes a bond between us and the deceased victims.
- Empty chair symbolizes survivors who are dying of old age without having yet witnessed justice.
- Shadow of the girl is that of an old grandma, symbolizing passage of time spent in silence.
- Butterfly in shadow represents hope that victims may resurrect one day to receive their apology.

Peace Monument

In memory of more than 200,000 Asian and Dutch women who were removed from their homes in Korea, China, Taiwan, Japan, the Philippines, Thailand, Vietnam, Malaysia, East Timor and Indonesia, to be coerced into sexual slavery by the Imperial Armed Forces of Japan between 1932 and 1945.

And in celebration of proclamation of "Comfort Women Day" by the City of Glendale on July 30, 2012, and of passing of House Resolution 121 by the United States Congress on July 30, 2007, urging the

> Japanese Government to accept historical responsibility for these crimes.
>
> It is our sincere hope that these unconscionable violations of human rights shall never recur.
>
> July 30, 2013.

12. No other monuments are present in this area of Central Park and, upon information and belief, no other permanent markers may be placed there without approval of the City Council.

13. Glendale exercises exclusive custody and control of Central Park and the Public Monument, and upon information and belief, provides all necessary maintenance services for the Public Monument.

The Historical Background of the Debate Concerning Comfort Women

14. During World War II and the decade leading up to it, an unknown number of women from Japan, Korea, China, and a number of nations in Southeast Asia, were recruited, employed, and/or otherwise acted as sexual partners for troops of the Japanese Empire in various parts of the Pacific Theater of war. These women are often referred to as comfort women, a loose translation of the Japanese word for prostitute.

15. Beginning in the 1980s, a dispute arose between South Korea and the government of Japan concerning the hardships experienced by Korean comfort women and whether the Japanese government forcefully recruited comfort women.

16. Officials of the Japanese government assert that the Japanese military and Japanese Imperial

government were not responsible for or directly involved in the recruitment of comfort women, and that private firms and individuals undertook the recruitment.

17. Other governments, including that of South Korea, claim that comfort women were recruited by and/or forced into sexual slavery by the Imperial Japanese government and/or officials of the Japanese military.

18. The debate concerning historic responsibility for the comfort women camps has been a significant and ongoing source of tension in recent decades between Japan and South Korea, both of which are critical American allies. Disagreements concerning responsibility for comfort women are a major impediment to improved present-day relations between Japan and South Korea, which are less than cordial.

Efforts by Japan and South Korea to Address the Dispute

19. After some years of controversy regarding the Japanese Imperial Government's alleged involvement with comfort women, in 1995 Japan established the Asian Women's Fund to distribute compensation to former comfort women in South Korea, the Philippines, Taiwan, the Netherlands, and Indonesia, and to provide them with letters of apology from the Prime Minister of Japan.

20. Nonetheless, several governments, including the government of South Korea, have continued to demand that Japan take additional steps to redress grievances relating to comfort women.

21. The Japanese government asserts that all World War II-related claims against Japan, including those related to comfort women, were resolved by the Treaty of Peace signed in San Francisco by Japan, the United States, and 47 other allied nations in 1951 (the "Treaty of San Francisco"), the Treaty on Basic Relations between Japan and the Republic of Korea dated June 22, 1965, and/or the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea also dated June 22, 1965 (the "Settlement Agreement").

22. Article 4(a) of the Treaty of San Francisco provides that claims of Korean and Chinese nationals relating to Japan's wartime conduct, including issues related to comfort women, are to be addressed through government-to-government negotiations between Japan and each of those countries.

23. Article 2(1) of the Settlement Agreement provides that the "problem concerning property, rights and interests of the two Contracting Parties [*i.e.*, Japan and South Korea] and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals . . . is settled completely and finally."

24. In December 2011, Japanese Prime Minister Yoshihiko Noda and South Korean President Lee Myung-bak held talks in Kyoto, Japan in an effort to improve bilateral relations between the two neighboring countries. The discussions terminated when President Lee pressed Prime Minister Noda to take additional responsibility for Korean comfort women. Plaintiffs are informed and believe that no further

discussions between Japan and South Korea have since taken place.

Glendale's Installation of the Public Monument

25. Glendale has established a Glendale Sister Cities program to initiate ongoing communication and "promote[] interest and good will" between and among Glendale and its Sister Cities. As of March 2009, Glendale had six Sister City partnerships: Higashiosaka, Japan; Hiroshima, Japan; Tlaquepaque, Mexico; Rosarito, Mexico; Ghapan, Armenia; and Goseong City, the Republic of Korea.

26. On September 6, 2011, the City Council instructed Glendale's Community Services and Parks staff to explore the possibility of dedicating a portion of public land within Glendale for acceptance and installation of memorials, monuments, and/or artifacts representative of Glendale's sister city partners.

27. On March 26, 2013, the City Council voted to dedicate a plot of public land within Central Park and adjacent to the Adult Recreation Center Plaza for the purpose of sister city-related monuments and memorials.

28. In the spring and summer of 2013, a proposal was made to place a statue in Central Park dedicated to comfort women. During that period, the City Council received hundreds of letters and emails in opposition to the installation of the monument, almost entirely from residents and interested persons of Japanese ancestry.

29. At a July 9, 2013 Special Meeting the City Council considered and approved a motion to install

the Public Monument, described as a "Korean Sister City 'Comfort Women' Peace Monument," on public land within Central Park. The report recommending approval of the installation of the Public Monument, submitted to the City Council in conjunction with the motion, included a schematic diagram depicting the proposed statue and its location. The inclusion of the motion to approve installation of the Public Monument in the Special Meeting agenda was submitted to and approved by Ochoa.

30. The schematic diagram of the proposed statue did not include any mention of, or reference to, the text of the plaque that currently is part of the Public Monument. During the Special Meeting, City Council Member Ara Najarian asked Glendale Community Relations Coordinator Dan Bell whether the statue would be accompanied by a plaque and, if so, its inscription. Mr. Bell advised the City Council that the plaque would say that it was "commemorating and in honor of the comfort women." Mr. Bell made no mention of the text of the plaque that ultimately was installed as part of the Public Monument.

31. During the Special Meeting, numerous individuals, including Japanese-Americans, publicly opposed and condemned the proposed installation of the statue, arguing that the comfort women issue is a matter of current diplomatic communications between South Korea and Japan, and the disputed view advanced by the South Korean government on comfort women.

32. Notwithstanding the numerous objections voiced at the Special Meeting, the City Council approved the installation of the "Korean Sister City 'Comfort Women' Peace Monument" "as shown and

described in the Report to Council dated July 9, 2013" by a vote of 4 to 1. Glendale Mayor Dave Weaver, who voted against installation of the Public Monument, later explained in a letter to Yoshikazu Noda, Mayor of Higashiosaka, Japan (a Glendale sister city) that the dispute over comfort women "is an international one between Japan and South Korea and the City of Glendale should not be involved on either side."

33. Three weeks after the City Council's approval, on July 30, 2013, the 1,100 pound bronze Public Monument was unveiled in Central Park. As described above, the statue was accompanied by a plaque accusing the Japanese government of "coerc[ing]" more than 200,000 women "into sexual slavery," and "urging the Japanese Government to accept historical responsibility for these crimes," which it labels an "unconscionable violations of human rights." The City Council never voted to approve the language included on the plaque.

34. Following the Public Monument's installation, at the July 30, 2013 Meeting of the City Council, Glendale City Council Member Laura Friedman commented: "We really put the city of Glendale on the international map today by doing this."

35. The installation of the Public Monument prompted opponents of the Public Monument to commence a petition to compel its removal. The petition, posted on President Barack Obama's website "We The People" in late 2013, quickly received more than 108,000 signatures.

The Japanese Government's Reaction to the Public Monument

36. Glendale's decision to install the Public Monument has elicited numerous unfavorable reactions from the Japanese government.

37. On July 24, 2013, Kuni Sato, the press secretary of the Japanese Ministry of Foreign Affairs, expressed Japan's official displeasure, remarking that installation of the Public Monument "does not coincide with our understanding" of the comfort women dispute.

38. On July 25, 2013, Yoshikazu Noda, the Mayor of Glendale's sister city, Higashiosaka, Japan, advised the City Council that the installation of the Public Monument was "an extremely deplorable situation and the people of Higashiosaka are hurt at a decision made by [Glendale] city to install a comfort woman monument."

39. On July 31, 2013, Kenichiro Sasae, Japanese Ambassador to the United States, declared that Glendale's action is "irreconcilable" with the position of the Government of Japan and is "highly regrettable."

40. On July 31, 2013, Mr. Yoshihide Suga, Japan's Chief Cabinet Secretary, described Glendale's decision to install the Public Monument as "extremely regrettable." He added that Glendale's action "conflicts with the [Japanese] government's view that the issue of the comfort women should not be part of any political or diplomatic agenda."

41. On August 13, 2013, Japanese Prime Minister Shinzo Abe stated that he was "extremely

dissatisfied" with the installation of the Public Monument.

42. On January 16, 2014, after being denied a request to meet with Glendale's Mayor and City Council, an association of 321 local Japanese government legislators submitted an official letter to Glendale, protesting the Public Monument's installation "in the strongest terms" and requesting "that the statue be removed immediately." The letter advised Glendale that "the distorted view of history that the statue represents . . . will surely jeopardize world peace and the possibility of a bright future for our children."

The Executive Branch's Foreign Policy Position on Comfort Women

43. The Executive Branch of the United States, which has primary authority over the direction and conduct of U.S. foreign affairs, consistently has sought to avoid having the United States become embroiled in the contentious historical debate concerning comfort women between its two most important East Asian allies.

44. For example, on May 8, 2001, the United States filed a Statement of Interest in connection with a lawsuit brought by 15 former comfort women against Japan entitled *Joo v. Japan*, United States District Court for the District of Columbia, Case No. 1:00-cv-02233-HHK. That Statement of Interest warned that addressing the comfort women issue in the United States could disrupt Japan's "delicate" relations with China and Korea, thereby creating "serious implications for stability in the region."

45. Based upon the Statement of Interest, the United States Court of Appeal for the District of Columbia Circuit dismissed the *Joo* case as presenting nonjusticiable political questions, holding that "choosing between the interests of two foreign states . . . would adversely affect the foreign relations of the United States."

46. The United States continues to encourage resolution of the comfort women issue between Japan and its neighbors through government-to-government negotiations. During a January 7, 2013 press briefing, White House Spokesperson Victoria Nuland reported that the Administration "continue[s] to hope that the countries in the region can work together to resolve their concerns over historical issues in an amicable way and through dialogue. As you know, we have no closer ally than Japan. We want to see the new Japanese Government, the new South Korean Government, all of the countries in Northeast Asia working together and solving any outstanding issues, whether they are territorial, whether they're historic, through dialogue."

47. During a trip to Seoul, South Korea in February 2014, U.S. Secretary of State John Kerry said: "It is up to Japan and [South Korea] to put history behind them and move the relationship forward. And it is critical at the same time that we maintain robust trilateral cooperation." "We urge our friends in Japan and South Korea, we urge both of them to work with us together to find a way forward to help resolve the deeply felt historic differences that still have meaning today . . . . We will continue to encourage both allies to find mutually acceptable approaches to legacy issues from the past."

48. In February 2014, Daniel Russel, the U.S. Assistant Secretary of State for East Asian and Pacific Affairs, commented that the U.S.'s position on the comfort women issue is to continue efforts to help manage "sensitive historical legacy problems in a way that contributes to healing and forgiveness in [] conversations in Japan and elsewhere in the region."

The Public Monument Threatens Irreparable Injury to Plaintiffs

49. Despite vocal domestic and international public protest, Glendale persisted in installing the Public Monument, forcing Plaintiffs to bring this action.

50. Allowing the Public Monument to remain in place in Glendale's Central Park threatens irreparable injury to Gingery, Mera, GAHT-US, and its members. As a longtime resident of Glendale with active involvement in Glendale's Sister City Program, the presence of the Public Monument within the designated Sister City area of Glendale's Central Park has turned visiting Central Park into a highly offensive endeavor, effectively denying Gingery full enjoyment of the Park's benefits.

51. The presence of the Public Monument has had a similar impact on GAHT-US's members, including Mera, who avoid using and benefitting from Glendale's Central Park.

52. Plaintiffs have no adequate remedy at law to address the foregoing injuries.

53. If the Public Monument is removed, Plaintiffs will again make use of Glendale's Central Park and its Adult Recreation Center.

54. An actual controversy has arisen and now exists between Plaintiffs and Defendants.

55. Plaintiffs contend that installation of the Public Monument unconstitutionally intrudes on the Executive Branch's authority to conduct American foreign policy, and that Glendale's installation of the Public Monument violates Glendale's Municipal Code.

56. Plaintiffs are informed and believe that Defendants disagree with Plaintiffs' contentions as set forth in the prior paragraph.

57. A justiciable controversy therefore exists between Plaintiffs and Defendants and a judicial declaration is necessary and appropriate at this time in order to determine the legality of Glendale's installation of the Public Monument.

FIRST CLAIM FOR RELIEF
(Unconstitutional Interference With Foreign Affairs Power)

58. Plaintiffs repeat and incorporate the allegations of Paragraph 1 through 57 herein.

59. The Public Monument interferes with the Executive Branch's primary authority to conduct foreign relations by disrupting federal foreign policy as to the resolution of the historical debate concerning comfort women. The Public Monument also violates the Supremacy Clause.

60. The Executive Branch's authority in the field of foreign affairs is violated by state or local actions that have more than an incidental or indirect effect on, or that have the potential for disruption or embarrassment of, United States foreign policy.

61. Glendale's installation of the Public Monument has a direct impact on U.S. foreign policy that is neither incidental nor indirect. By installing the Public Monument, Glendale has taken a position in the contentious and politically-sensitive international debate concerning the proper historical treatment of the former comfort women. More specifically, given the inflammatory language used in the plaque that is prominently featured alongside the statue, Glendale has taken a position at odds with the expressed position of the Japanese government.

62. The Public Monument is inconsistent with the dual foreign policy objectives promulgated by the Executive Branch on this controversial issue: (1) avoid taking sides in this sensitive historical and political debate between the United States' two most important East Asian allies; and (2) encouraging a resolution to the current diplomatic impasse between the two countries through further government-to-government negotiations.

63. As the reactions from the highest echelons of the Japanese government make clear, Glendale's actions have great potential for disrupting the delicate diplomatic line struck by the Executive Branch on this contentious issue. The Public Monument thus threatens to undermine the U.S. government's foreign relations with a critical Asian ally and, more generally, to destabilize already strained diplomatic relations in this important region of the world.

64. Glendale's action also takes a position on a matter of foreign policy with no claim to be addressing a traditional state responsibility.

65. The actions of Glendale and the City Council in approving and installing the Public Monument are beyond its authority, in violation of the U.S. Constitution's foreign affairs power and the Supremacy Clause, and the Public Monument therefore must be removed.

66. The actions of defendant Ochoa in approving and submitting the proposal to install the Public Monument on public land, and in including a motion to approve the installation in the Special Meeting Agenda, are beyond his authority and unconstitutional, and the Public Monument therefore must be removed.

SECOND CLAIM FOR RELIEF
(Violation of the Glendale Municipal Code)

67. Plaintiffs repeat and incorporate the allegations in Paragraph 1 through 66 herein.

68. Glendale Municipal Code Section 2.04.140 provides: "In all matters and things not otherwise provided for in this chapter, the proceedings of the council shall be governed under Robert's Rules of Order, revised copy, 1952 edition." Pursuant to Robert's Rules of Order, to introduce a new piece of business or propose a decision or action, a motion must be made by a group member. A second motion must then also be made. And after limited discussion, the group then votes on the motion. A majority vote is required for the motion to pass.

69. The Public Monument was not properly approved by the City Council pursuant to Glendale Municipal Code Section 2.04.140. An integral part of the Public Monument—the plaque that specifically

attributes responsibility for, *inter alia*, "snatching [women] from their homes" and "coerc[ing them] into sexual slavery" to Japan—was neither proposed to the City Council nor made the subject of a motion to the City Council, and was not approved by it, as required. In fact, the proposed language presented to the Council never mentioned Japan at all, and the City Council was specifically advised that the inscription on the plaque would be different than the inscription ultimately used.

70. As a result, the installation of the monument violated the Glendale Municipal Code.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. That the Court declare Glendale's installation of the Public Monument unconstitutional and null and void;

2. That the Court preliminarily and permanently enjoin and compel defendants, and each of them, to remove the Public Monument from public property in Glendale, including but not limited to, any area in or adjacent to Central Park;

3. That the Court award Plaintiffs their costs and attorneys' fees pursuant to 42 U.S.C. § 1988; and

4. For such other and further relief as the Court may deem just and proper.

Mayer Brown LLP
Neil M. Soltman
Matthew H. Marmolejo
Ruth Zadikany

Rebecca B. Johns

By:

/s/ Neil M. Soltman
Attorneys for Plaintiffs
Michiko Shiota Gingery,
Koichi Mera, and GAHT-
US Corporation

Dated: February 20, 2014

PLAINTIFFS-APPELLANTS' OPENING BRIEF (MARCH 13, 2015)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHIKO SHIOTA GINGERY, KOICHI MERA, and GAHT-US CORPORATION,

Plaintiffs-Appellants,

v.

CITY OF GLENDALE, a Municipal Corporation, SCOTT OCHOA, in his capacity as Glendale City Manager,

Defendants-Appellees.

No. 14-56440

On Appeal from United States District Court Central District of California Case No. 2:14-cv-1291
Honorable Percy Anderson, Judge Presiding

Maxwell M. Blecher
Donald R. Pepperman
Taylor C. Wagniere
Blecher Collins Pepperman & Joye
515 South Figueroa Street,
Suite 1750
Los Angeles, CA 90071-3334
Telephone: (213) 622-4222
Attorneys for Plaintiffs-Appellants

Ronald S. Barak
Law Offices of Ronald S. Barak
206 Giardino Way
Pacific Palisades, CA 90272
Telephone: (310) 459-3963
Attorneys for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, none of the Plaintiffs-Appellants has a parent corporation, subsidiaries, or affiliates that have issued shares to the public.

STATEMENT OF JURISDICTION

(A) District Court Jurisdiction: The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1367.

(B) Appellate Jurisdiction: Plaintiffs-Appellants are appealing from the district court's final judgment and order granting Defendants-Appellees' Motion to Dismiss, entered on August 4, 2014. (ER 18-19.)[1] Plaintiffs-Appellants timely filed a Notice of Appeal on September 3, 2014. (ER 01-17.) This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in denying leave to amend the Complaint?

2. Whether the district court erred in holding that Plaintiffs-Appellants lacked standing to bring a foreign affairs preemption claim against the City of Glendale to challenge the installation and maintenance of a 1,100 pound statue and plaque on public lands that unconstitutionally intrudes on the federal government's foreign affairs powers, where Plaintiffs-Appellants suffered injury-in-fact by being unable to use and enjoy the public land where the monument and

---

[1] "ER" refers to the Excerpts of Record filed concurrently.

plaque were installed and/or, in the alternative, where Plaintiff-Appellant Michiko Shiota Gingery has municipal taxpayer standing?

3. Whether Glendale's action is preempted by the federal government's exclusive authority to regulate foreign affairs?

STATEMENT OF THE CASE

A. Introduction

This is a case concerning whether the City of Glendale, acting without any basis of traditional local government authority, can purposefully inject itself into a highly-charged and contested area of foreign affairs by installing a 1,100 pound monument and accompanying plaque concerning Comfort Women that by their very nature and existence threaten diplomatic relations with Japan, one of the United States' closest international friends and allies. In July 2013, even though Glendale's then-mayor recognized that the historical dispute over World War II Comfort Women "is an international one between Japan and South Korea and the City of Glendale should not be involved on either side" (ER 62, ¶32), Glendale approved and installed in its Central Park a bronze statue of a young girl in Korean dress sitting next to an empty chair with a bird perched on her shoulder. (ER 57-58, ¶11.) Integral to and featured prominently next to the bronze statue is a permanent granite plaque that was never approved by the City Council. Among other language describing the statue, the plaque contains the following language concerning Japan's activities during World War II:

"I was a sex slave of the Japanese Military";

> "In memory of 200,000 Asian and Dutch women who were removed from their homes in Korea, China, Taiwan, Japan, the Philippines, Thailand, Vietnam, Malaysia, East Timor and Indonesia, to be coerced into sexual slavery by the Imperial Armed Forces of Japan between 1932 and 1945";
>
> "And in Celebration of proclamation of 'Comfort Women Day' by the City of Glendale on July 30, 2012 and of the passing of House Resolution 121 by the United States Congress on July 30, 2007,
>
> urging the Japanese Government to accept historical responsibility for these crimes";
>
> "It is our sincere hope that these unconscionable violations of human rights shall never recur." (*Id.*)

Regardless of the historical accuracy of these statements (and, to be sure, there is significant scholarly and diplomatic debate in the highest levels of government as to what actually occurred), the installation of this monument and plaque—taking a foreign affairs position that Japan violated international human rights law by coercing women into sexual slavery and advocating that an important friend and ally of the United States "accept historical responsibility for these crimes"—clearly interferes with foreign affairs, and violates the Supremacy Clause. Glendale's actions are thus preempted.

To be clear, these are not anodyne statements merely "commemorating" historical events; this is advocacy on the part of Glendale directed at Japan. Indeed, public responses from the highest echelon of

the Japanese Government, including Japan's Prime Minister, Japan's Chief Cabinet Secretary, and Japan's Ambassador to the United States, all confirm that Glendale's advocacy has created significant diplomatic tensions with Japan. (ER 63-64, ¶¶36-42.)

Glendale knew this was to be expected. Since at least 2001, the U.S. Government has taken the firm position that the Comfort Women issue should be dealt with exclusively by the federal government because any other course could disrupt Japan's "delicate" relations with China and South Korea and create "serious implications for stability in the region." (ER 64, ¶44.) Glendale should not have addressed this issue, especially through an unconstitutional monument and plaque on public lands.

The question before this Court is not whether human rights atrocities were committed by Japan during World War II, but instead whether a California city may label Japan a violator of international human rights for alleged actions during World War II and advocate that Japan's present government accept public and international responsibility. Furthermore, the question is who has standing to bring such a claim. Neither one of these issues requires this Court to do anything more than apply clearly established Supreme Court and Ninth Circuit precedent. This Court can do so without entangling itself in foreign affairs.

Notwithstanding clearly established precedent in this Circuit providing Plaintiffs-Appellants ("Plaintiffs") with standing, the district court held that Plaintiffs lacked standing to raise these claims because this was not an Establishment Clause case. (ER 23.) The district court also held—even though it no longer had

jurisdiction once it resolved the standing inquiry against Plaintiffs—that they also failed to state a claim upon which relief could be granted. (ER 24-26.) It also refused leave to amend—even one time. (ER 26.) This appeal now follows.

B. Factual Background

Glendale is a small municipality in California. (ER 56, ¶9.) Glendale's governing authority consists of a five-member city council ("City Council"), one of whom also serves as Glendale's mayor. (*Id.*) Glendale's Central Park contains an Adult Recreation Center, which the residents of Glendale and the surrounding areas may freely use. (ER 57-58, ¶11.) Glendale installed the monument and plaque immediately adjacent to the Adult Recreation Center in Central Park. (*Id.*)

Plaintiff Michiko Shiota Gingery is a long-time resident of Glendale who would like to use the Adult Recreation Center and enjoy Central Park. (ER 54-55, ¶6.) As a Glendale resident of Japanese heritage, she strongly believes the monument and plaque present an unconstitutional and unfairly one-sided portrayal of the debate surrounding Comfort Women. She thus suffers feelings of exclusion, humiliation, and anger because of the unconstitutional monument and plaque's allegations concerning the Japanese during World War II. (*Id.*) Plaintiff Koichi Mera is a Japanese-American living in nearby Los Angeles. He is similarly alienated, humiliated, and angered by the unconstitutional monument and plaque. (ER 55-56, ¶8.) Despite wanting to make use of Central Park, both Gingery and Mera avoid using Central Park and the Adult Recreation

Center because of the unconstitutional monument and plaque. (ER 54-56, ¶¶6, 8.)

The presence of the monument and plaque also negatively affect Plaintiff GAHT-US Corporation's ("GAHT-US") local members, who avoid using and benefitting from Glendale's Central Park. (ER 66, ¶51.) GAHT-US is a California non-profit corporation with the purpose of strengthening the historical and cultural ties between the Japanese and American people by providing educational resources about World War II history and, specifically, Japan's involvement in World War II. (ER 55, ¶7.) Several of GAHT-US's members live in Glendale and the surrounding areas. (*Id.*) These members suffer feelings of exclusion, humiliation, and anger, and do not use the Central Park or Adult Education Center on account of the unconstitutional monument and plaque. If the monument and plaque were removed, Plaintiffs would make use of Central Park and the facilities located in it. (ER 66, ¶53.)

1. The Monument and Plaque

On July 30, 2013, Glendale installed the monument in Glendale's publicly-owned Central Park near the Adult Recreation Center. (ER 57-58, ¶11.) The monument was approved at a Special Meeting of Glendale's City Council on July 9, 2013, during which a schematic diagram depicting the proposed statue and its location—but not the text of its accompanying plaque—was presented to the City Council and the public. (ER 61-62, ¶¶29-30.)

The monument and plaque relate to historically contested international events that occurred during

World War II concerning the allegedly forced recruitment of women who served as sexual partners for the Japanese Imperial Army. (ER 58-59, ¶¶14, 18.) The heated international debate concerning responsibility for these women, known as "Comfort Women," continues to this day, and has been a source of continuing and substantial tension between the nations of Japan and South Korea in recent decades. (ER 59, ¶18.) Japan asserts that all World War II-related claims were resolved pursuant to the Treaty of Peace signed in 1951 by Japan, the United States, and nearly 50 other allied nations. (ER 60, ¶¶21-23.) Japan also established the Asian Women's Fund in 1995 to compensate former Comfort Women in numerous countries including South Korea. (ER 59, ¶19.) South Korea, however, contends that the Comfort Women issue remains unresolved and unredressed. (*Id.*, ¶20.) As recently as December 2011, the Comfort Women issue was divisive in discussions between Japan's then-Prime Minister Yoshihiko Noda and South Korea's then-President Lee Myung-bak. (ER 60, ¶24.) In fact, discussions aimed specifically at strengthening the relationship between the two countries terminated when South Korea's President Lee urged Japan's Prime Minister Noda to take additional responsibility for Comfort Women. (*Id.*)

The federal government has generally and rightfully sought to avoid becoming a party to this contentious historical debate between its important Asian allies. (ER 64, ¶43.) In 2001, the United States filed a Statement of Interest in connection with a different lawsuit, *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), brought by former Comfort Women against Japan in the United States that warned of the

"delicate" relations involved and that pronouncing on the Comfort Women issue in the United States could create "serious implications for stability in the [East Asian] region." (*Id.*, ¶44; ER 35-51.) In the last two years, White House Spokesperson Victoria Nuland, Secretary of State John Kerry, and Daniel Russel, U.S. Assistant Secretary of State for East Asian and Pacific Affairs, have all stated that the Comfort Women issue is one between Japan and South Korea, and that the United States is hopeful that the nations will work together to resolve their differences. (ER 64-65, ¶¶46-48.)

2. Local and International Criticism of the Monument and Plaque

Because of the controversy surrounding Comfort Women, there has been considerable backlash over the monument and plaque from members of Glendale's community, local Japanese Americans, and Japanese governmental officials. (ER 61-62, ¶¶30-31.) Public outcry over the outright and unconstitutional foreign affairs advocacy of the monument and plaque began even before the monument and plaque were unveiled on July 30, 2014. During the City Council's Special Meeting on July 9, 2013, numerous people voiced their opposition to the monument, and many argued to the City Council that the issue of Comfort Women is a matter exclusively for diplomatic foreign relations and that the proposed monument presented a contentious viewpoint that inappropriately inserted Glendale into foreign affairs. (ER 62, ¶31.)

After the monument and plaque were installed, Japanese officials at all levels of government publicly expressed disapproval of the monument and plaque and

Glendale's foray into international politics. (ER 63-64, ¶¶37-42.) On July 24, 2013, the press secretary of the Japanese Ministry of Foreign Affairs commented that the monument and plaque "does not coincide with our [Japan's] understanding" of the Comfort Women dispute. (ER 63, ¶37.) Over the next week, at least three other Japanese officials expressed disappointment with Glendale's actions. (ER 63-64, ¶¶39-42.) By August 2014, word of Glendale's actions reached the highest ranks of the Japanese government. (*Id.*) On August 13, 2014, Japanese Prime Minister Shinzo Abe stated that he was "extremely dissatisfied" with the installation of the monument and plaque. (ER 63, ¶41.)

Members of Glendale's City Council acknowledged the foreign affairs intrusion of Glendale's actions on numerous occasions. At the July 30, 2013 City Council Meeting, City Council Member Laura Friedman commented: "We really put the city of Glendale on the international map today by doing this." (ER 62, ¶34.) Then-Mayor Dave Weaver admitted that it was inappropriate for Glendale to comment on this specific foreign affairs matter: The dispute over Comfort Women "is an international one between Japan and South Korea and the City of Glendale should not be involved on either side." (ER 62, ¶32.)

Importantly, when the monument was being considered by the City Council, then-Councilmember Zareh Sinanyan, now Glendale's mayor, emphasized that Glendale intended to insert itself into foreign affairs notwithstanding his expressly acknowledged understanding that such action violated this Court's clear case law:

> Another argument [is that] Glendale has no authority to do anything about this issue, it's

> a federal issue. Just last year, the Turkish government pushed a lawsuit which they succeeded on in the Ninth Circuit making the exact same argument, saying that the recognition of the Armenian genocide by state authorities was not proper [presumably referring to this Court's decision in *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012)] . . . I'm sorry it's a moral issue, not a state issue. . . We are taking a meaningful step to show our moral support, our sharing of the pain that our Korean brothers and sisters feel about this issue . . .[2]

C. The District Court's Dismissal with Prejudice

On August 4, 2014, without any hearing, Judge Anderson issued an opinion granting Glendale's Federal Rule of Civil Procedure 12(b)(1) motion and also, without jurisdiction to do so, purported to grant Glendale's Rule 12(b)(6) motion. (ER 20-27.) In his Order, Judge Anderson: (1) determined that the Court

---

[2] *See* Plaintiffs-Appellants' Motion To Take Judicial Notice filed concurrently herewith, and Plaintiffs-Appellants' Motion To File Physical Exhibit, filed on February 27, 2015 (Doc. #15). This Court may take judicial notice of these statements. *See* Fed. R. Evid. 201(b)(2) (allowing a court to take judicial notice of a fact "not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (a court may consider "matters properly subject to judicial notice."). Accordingly, Plaintiffs respectfully request permission file DVD copies of this video. This content of this video recording can also be found on Defendant's official website at http://www.glendale.granicus.com/mediaplayer.php?view_id=12&clip_id=4249.

did not possess subject matter jurisdiction; (2) in the alternative, dismissed the case on the merits; (3) declined to exercise supplemental jurisdiction over Plaintiffs' state law claim (ER 26); (4) denied Glendale's companion special "anti-SLAPP" motion to strike as "moot" (ER 27); and (5) tolled the statute of limitations on Plaintiffs' state law claim. (ER 26-27.) Plaintiffs' federal cause of action was dismissed by Judge Anderson with prejudice without allowing Plaintiffs to amend their complaint even a single time. (ER 24-26.) In contravention of controlling precedent, Judge Anderson ruled that "even if" the Court had subject matter jurisdiction, "dismissal is still appropriate because Plaintiffs have failed to allege facts that state a cognizable legal theory." (ER 25.) On September 3, 2014, Plaintiffs filed a timely Notice of Appeal. (ER 01-17.)

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint under Rule 12(b) of the Federal Rules of Civil Procedure. *See, e.g.*, *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986) (Rule 12(b)(1) dismissal for lack of subject matter jurisdiction); *Ft. Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984) (Rule 12(b)(6) dismissal for failure to state a claim). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). When

"reviewing a motion to dismiss," this Court must not place "an unreasonable burden" on plaintiffs. *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1178 (9th Cir. 2000). Furthermore, in a *de novo* review, absolutely no appellate deference should be given to the district court's decision. *Rabkin v. Oregon Health Scis. Univ.*, 350 F.3d 967, 970 (9th Cir. 2003). Instead, this Court must look solely at the allegations contained in the complaint, as well as any documents that are properly subject to judicial notice. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 526 (9th Cir. 2008). "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citing *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996)). Such a dismissal will be affirmed only if it appears "beyond doubt" that the complaint cannot be saved by further amendment. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987) (citation omitted).

SUMMARY OF ARGUMENT

1. The district court erred in dismissing the Complaint and refusing to grant Plaintiffs leave to amend—even once—because the Complaint could easily be amended to establish standing and state a claim upon which relief could be granted <u>if that was not already the case</u>.

2. In any event, the district court crafted an illogical and inconsistent rule for establishing the standing of an individual plaintiff who loses the enjoyment and recreational use of public lands on

account of the installation and maintenance of an unconstitutional monument and plaque that injects a local government into issues of foreign affairs constitutionally reserved for the federal government. The district court held, notwithstanding this Court's controlling precedent in *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008) (recently reaffirmed as the standing law of this Circuit by *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1076–77 (9th Cir. 2012)), that an individual plaintiff's avoidance of a public park on account of an unconstitutional monument and plaque erected by a city "is simply not the type of injury" that gives rise to standing to raise a foreign affairs preemption claim. (ER 23.) While the district court believed it could decide which injuries are appropriate to afford standing in a case raising important questions of foreign affairs preemption, this Court has been clear that district courts should not mix the standing analysis with the merits. The injury alleged by the individual Plaintiffs here—psychological injury coupled with the loss of enjoyment and use of Glendale's Central Park on account of the installation and maintenance of an unconstitutional monument and plaque—is precisely the type of injury-in-fact that this Court has found sufficient for purposes of standing in *Barnes-Wallace* and numerous other cases. As *Barnes-Wallace* is controlling precedent, the individual Plaintiffs clearly have standing to bring suit, and the district court's holding to the contrary must be reversed.

Even if the individual plaintiffs do not have standing under *Barnes-Wallace*, this Court should hold that Plaintiff Gingery has municipal taxpayer standing as she resides in Glendale and pays taxes

that are used to maintain the monument and plaque, and were used to acquire and maintain the land on which the monument and plaque sit, in which case the Court need not reach the standing of the other plaintiffs. *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998). At a minimum, this Court should grant Plaintiff Gingery leave to amend her Complaint to show municipal taxpayer standing.

Given that the individual Plaintiffs clearly have standing in this case, the Court need not reach the organizational Plaintiff's standing. nonetheless, GAHT-US does have standing because one or more of its members have standing and because the interests at stake are germane to the organization's purpose and the participation of individual members is not required in the lawsuit.

3. Once the district court held that Plaintiffs lacked standing, it no longer had jurisdiction to adjudicate the merits. The district court, however, improperly assumed hypothetical jurisdiction and sought to resolve the merits. In light of the unique circumstances of this case where the district court has given every reason to believe that even with Plaintiffs standing established a 12(b)(6) dismissal is imminent, this Court should not only find standing, but should also hold that Plaintiffs state a claim upon which relief can be granted and remand the case to the district court for further proceedings consistent with such a holding. *See Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (recognizing this Court's discretion to proceed to the merits on appeal).

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO GRANT LEAVE TO AMEND—EVEN ONCE

The district court dismissed Plaintiffs' Complaint without permitting leave to amend—even once—contrary to this Court's controlling case law. *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004) ("Dismissal of a complaint without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint cannot be saved by any amendment."). The district court provided no justification for this extreme judgment. There are instances where leave to amend should not be granted, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Plaintiffs' Complaint falls into none of these narrow categories.[3]

The district court did not base its dismissal on the statute of limitations or some other reason which Plaintiffs would be unable to cure by amendment.

---

[3] The district court noted that "Plaintiffs have not asked for leave to amend the Complaint to cure the deficiencies identified by Defendant." (ER 26.) Though never given the opportunity, "[i]t is of no consequence that no request to amend the pleading was made in the district court." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (emphasis added) (citation omitted). No specific request for leave to amend is needed to require a district court to comply with Rule 15. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

Rather, each issue the district court relied upon was based on facts alleged in the Complaint, which should have been liberally construed in favor of Plaintiffs, and, to the extent necessary, could have been fixed easily through amendment.

Despite the district court's erroneous conclusion otherwise, allowing Plaintiffs to amend the Complaint—especially for the first time—would not have been futile. This Court has held that the standard for futility is extremely high. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). As this brief shows, in particular in Part IIB *infra* at 26–28, addressing Plaintiff Gingery's tax standing, amendment would not be futile.[4]

---

[4] In addition to taxpayer standing, Plaintiffs could have pled facts, especially with limited discovery, to show, for instance, that Glendale's City Council erected the monument and plaque in order to influence foreign affairs and to discriminate against Japan and the Japanese generally. Furthermore, Plaintiffs also could have added facts demonstrating Glendale's stigmatic injury to Plaintiffs (and all Japanese-Americans) based upon the language in the plaque and a resulting cause of action against Glendale for violation of the Equal Protection Clause of the U.S. Constitution. *See, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

II. PLAINTIFFS HAVE STANDING TO CHALLENGE GLENDALE'S INSTALLATION OF A PUBLIC MONUMENT AND PLAQUE THAT UNCONSTITUTIONALLY INTERFERES WITH THE FEDERAL GOVERNMENT'S EXCLUSIVE POWER TO REGULATE FOREIGN AFFAIRS

The elements of Article III standing are well-established. The plaintiff must allege "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). A complaint need not provide any detailed analysis establishing the particular injury suffered. Rather, a plaintiff must set forth only general allegations of injury because the court will "presume that general allegations embrace the specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (internal quotations omitted).

As discussed below, it is clear under this Court's case law that a plaintiff that alleges psychological injury coupled with the inability to use and enjoy public land on account of the placement of an unconstitutional monument on that land has standing to sue. The district court, however, held that this case does not raise the type of injury that affords a plaintiff standing to raise a foreign affairs preemption claim. (ER 23.) There is no legal basis for this holding. Under the district court's incorrect rationale, numerous plaintiffs alleging all manner of claims arising from unconstitutional use of public lands—from Establishment Clause challenges regarding the placement of religious symbols to challenges to environmental regulations—

would be subject to dismissal for lack of standing in this Circuit. This Court should hold, following *Barnes-Wallace*, that Plaintiffs satisfy all three prerequisites for standing for the following reasons.

A. The Individual Plaintiffs Have Standing Because Glendale's Installation of the Monument and Plaque Directly Results in Their Psychological Injury and Loss of Enjoyment and Recreational Use of Glendale's Public Land

The individual Plaintiffs have suffered an injury-in-fact because Glendale's unconstitutional placement of the monument and plaque in Glendale's Central Park causes them emotional harm that prevents them from using the Central Park and its Adult Recreation Center, and thus denies them full enjoyment of the park's benefits. (ER 54-56, ¶¶6-9.) Plaintiffs avoid using and enjoying the Glendale Central Park and its Adult Recreation Center so long as the monument and plaque remain in place on account of strong feelings of exclusion, discomfort, humiliation, and anger directly caused by the unconstitutional monument and plaque. (*Id.*)

While psychological injury alone is not an injury-in-fact sufficient for standing under Article III, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485–86 (1982), under Supreme Court case law psychological injury coupled with impairment of aesthetic and recreational interests in the use of land is without question sufficient to confer standing, *Lujan*, 504 U.S. at 562–63; *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73–74 (1978); *Sierra Club v.*

Morton, 405 U.S. 727, 734–35 (1972). As the Supreme Court has recognized, plaintiffs allege injury-in-fact when they "are persons for whom the aesthetic and recreational value of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 182 (2000) (quoting *Sierra Club*, 405 U.S. at 735.) This Court has also recognized that standing exists where plaintiffs' enjoyment and use of public land would be diminished by events occurring on the land. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005) (holding that a plaintiff organization suffered injury from increased risk of an oil spill that would impair its aesthetic or recreational enjoyment of a stretch of Alaskan coastline); *see also Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068 (9th Cir. 1997) (finding standing for diminished enjoyment of land in part because of "noise, trash and wakes of vessels[.]").

The specific injury alleged here clearly gives rise to standing because unconstitutional displays of monuments and memorials on public land may cause an individual such distress (and thus an injury-in-fact) that he/she may no longer freely use and enjoy the land on which the display in located. *See e.g.*, *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004) ("We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact."); *Barnes-Wallace*, 530 F.3d at 784 ("We have held that . . . restrictions on plaintiffs' use of land constitute redressable injuries for the purposes of Article III standing."); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) ("[T]he district court properly determined that a plaintiff has been injured due to his

or her not being able to freely use public areas.") (internal quotations omitted); *Hewitt v. Joyner*, 940 F.2d 1561, 1564 (9th Cir. 1991) (affirming the district court's determination that "the plaintiffs demonstrated an injury in fact by the curtailment of their right to use a public park."). Affirmative avoidance of public lands in light of symbols or monuments displayed there is more than sufficient to establish a legally cognizable injury for purposes of standing. *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1252–53 (9th Cir. 2007).

While many of these standing cases arise in the context of Establishment Clause challenges to governmental displays of religious symbols on public lands, this Court has been clear that the standing analysis is not limited to just Establishment Clause cases. For instance, in *Barnes-Wallace*, this Court held that because the plaintiffs wanted to use portions of a park leased to the Boy Scouts, but did not do so because they were "offended" by the Boy Scouts' policies excluding homosexuals, atheists, and agnostics from membership, they showed "both personal emotional harm and the loss of recreational enjoyment" which clearly constituted an injury-in-fact. 530 F.3d at 785 (emphasis added). While this Court drew an analogy to Establishment Clause cases, it explained that "[p]sychological injury can be caused by symbols or activities other than large crosses." *Id.* at 786 n.6. This Court also noted, again by analogy, that standing rules for environmental cases lend additional support to a general rule of standing that psychological injury coupled with a loss of enjoyment of public land on account of events occurring on the land supports standing. *Id.* at 785.

There is no reason to view these cases as limited to Establishment Clause claims, as Judge Anderson erroneously did. (ER 23.) The Supreme Court has explicitly rejected the view that standing doctrine under the Establishment Clause is the product of "special exceptions." *Valley Forge*, 454 U.S. at 488. The Supreme Court has also applied the same standing analysis from cases brought under the Establishment Clause to cases in other contexts. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 (2014) (applying analysis from *Valley Forge* when evaluating standing under the Equal Protection Clause).

This Court's rule for purposes of Article III standing is clear: Where psychological injury "interferes with [] personal use of [public] land," there is standing to bring suit. *Barnes-Wallace*, 530 F.3d at 784 (citing *Valley Forge*, 454 U.S. at 485).

The *Barnes-Wallace* court employed a common sense rule for standing where public monuments are challenged as unconstitutional. That rule can be stated as follows: A mere ideological objection to a monument does not confer standing, *Valley Forge*, 454 U.S. at 485–86, but a psychological injury on account of an unconstitutional monument that causes plaintiffs to avoid public lands by reason of the unconstitutional monument itself and the message it displays clearly does confer standing, *Barnes-Wallace*, 530 F.3d at 784.

Such a rule is particularly appropriate in cases such as this where the suit is based on the Constitution itself. In numerous cases, this Court has been clear that suits raising constitutional claims are to be construed liberally when evaluating standing. *See,*

e.g., *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (noting that when a case "implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing.") (emphasis added); *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (same). As such, the presumption in a case like this where governmental action is challenged as unconstitutional is to find standing.

Here, the Complaint, which must be construed in favor of Plaintiffs and accepted as true, alleges that they "would like to use Glendale's Central Park and the Adult Recreation Center located within Central Park," but they now avoid "doing so because [they are] offended by the Public Monument's pointed expression of disapproval of Japan and the Japanese people." (ER 55, ¶6.) For the same reasons, the presence of the monument and plaque in Glendale's Central Park also "diminishes [their] enjoyment of the Central Park and its Adult Recreation Center." (ER 55, ¶7.) Glendale has erected a monument and plaque that associates Japan and the Japanese with alleged war crimes, sexual slavery, and "unconscionable violations of human rights." (ER 58, ¶11.) Plaintiffs thus suffer "feelings of exclusion, discomfort, and anger" because they are of Japanese heritage, and are directly implicated by the monument and plaque. (ER 54-56, ¶6-8.) This takes Plaintiffs' injuries far outside the realm of a "generalized grievance" because the injuries are suffered uniquely by those of Japanese heritage living in Glendale and the surrounding areas who have a direct interest in using the land and facilities located in Glendale's Central Park. Plaintiffs would be confronted with the monument and plaque any time

they attempt to make use of the Adult Recreation Center facilities or enter Central Park. (ER 65-66, ¶¶50, 53.) Even more than the *Barnes-Wallace* plaintiffs, Plaintiffs here must choose between avoiding Glendale's Central Park or being forced to confront the monument and plaque in order to use these public facilities. *See Barnes-Wallace*, 530 F.3d at 785 ("The plaintiffs are faced with the choice of not using Camp Balboa and the Aquatic Center, which they wish to use, or making their family excursions under the dominion of an organization that openly rejects their beliefs and sexual orientation."). The individual Plaintiffs have thus suffered an injury-in-fact under this Court's clearly established case law.

The individual Plaintiffs likewise amply satisfy the Article III requirements of traceability and redressability. Indeed, Glendale has never suggested otherwise. Instead, all of Glendale's standing arguments before the district court were focused on injury-in-fact. The "causal connection" between Glendale's unconstitutional actions and the inability of the Plaintiffs to use and enjoy the Central Park and Adult recreation center is unmistakable. *See Lujan*, 504 U.S. at 560 ("[T]here must be a causal connection between the injury and the conduct complained of[.]"); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997) (injury must be "fairly traceable to the actions of the defendant[.]") (internal quotations omitted). Plaintiffs objected to Glendale's decision to install the monument and plaque and expressed their disagreement at Glendale City Council meetings well before filing suit. (ER 61-62, ¶¶28, 31-32.) After the monument and plaque were erected, Plaintiffs avoided using Glendale's Central Park despite their stated wish to

make use of that land and its facilities. Their injuries are much more than an "abstract objection" because at least one of the Plaintiffs resides in Glendale in close proximity to Central Park, they are Japanese-Americans, and they have stated personal interest in using the land at issue. *See Barnes-Wallace*, 530 F.3d at 785 ("[Plaintiffs] reside in San Diego, where Camp Balboa and the Aquatic Park are located, and have expressed a desire to make personal use of the facilities operated by the Council."). But for Glendale's installation and maintenance of the monument and plaque, there would be no injury.

A decision declaring that the monument and plaque are unconstitutional and an injunction requiring removal would plainly redress the injury. *See Lujan*, 504 U.S. at 561 ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"). Plaintiffs' psychological injuries and physical avoidance of Glendale Central Park would be remedied by the removal of the monument and plaque. As the Complaint makes plain, if the monument and plaque are removed, Plaintiffs will make use of Glendale's Central Park. (ER 66, ¶53.) As long as Glendale maintains the monument and plaque in its current state, Plaintiffs will suffer continued humiliation and loss of recreational use of Glendale Central Park. *See Barnes-Wallace*, 530 F.3d at 787 ("As long as the Council as an organization maintains policies that exclude from participation and demean people in the plaintiffs' position, no amount of evenhanded access to the leased facilities will redress the plaintiffs' injury: emotional and recreational harm arising out of the

Council's control and administration of public land that the plaintiffs wish to use.").

Accordingly, under well-established jurisprudence, the individual Plaintiffs have satisfied the "irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560.

B. In the Alternative, this Court Should Hold that Plaintiff Gingery Has Municipal Taxpayer Standing, or it Should Provide Her with Leave to Amend the Complaint

Individual Plaintiff Michiko Gingery also has municipal taxpayer standing because she pays taxes as a resident of Glendale (ER 54-55, ¶6), and these taxes were used to support the monument and plaque and are still being used to support its maintenance. (ER 58, ¶13.) To establish standing in a municipal taxpayer suit, this Court requires "pocketbook injury," which "simply requires the 'injury' of an allegedly improper expenditure of municipal funds." *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991).

Gingery alleges in the Complaint that she is "a long-time resident of Glendale" (ER 54-55, ¶6) and that "Glendale exercises exclusive custody and control of Central Park and the Public Monument, and upon information and belief, provides all necessary maintenance services for the Public Monument." (ER 58, ¶13.) The Court should find standing based on these allegations.

In the alternative, this Court should grant leave to amend either by remanding the case to the district court or under 28 U.S.C. § 1653 so that Plaintiff Gingery may plead such standing with additional

facts, if required. *Snell v. Cleveland, Inc.*, 316 F.3d 822, 828 (9th Cir. 2002); *see also* 28 U.S.C. § 1653 ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."); *Blue Ridge Insurance Co. v. Stanewich*, 142 F.3d 1145, 1148 (9th Cir. 1998) (declining to remand case to district court where the jurisdictional defect in the complaint "may be cured by amendment and nothing is to be gained by sending the case back for that purpose") (internal citations and quotations omitted).

It is respectfully submitted that it would be a waste of judicial resources to remand this action to the district court with directions to allow Plaintiff Gingery to amend the Complaint. After she would amend to establish standing, the district court would almost certainly dismiss the Complaint for failure to state a claim. Then, the parties would return again to this Court for resolution of the same issues presented on the merits of this appeal. As discussed in greater detail below in Parts III and IV, this Court should thus allow amendment now, find standing, and then hold that the Complaint states a claim upon which relief can be granted. *See Kimes*, 84 F.3d at 1126.

C. Plaintiff GAHT-US Has Organizational Standing

Given that the individual Plaintiffs clearly have standing to sue in this case, the Court need not reach the issue of GAHT-US's organizational standing. *See Clinton*, 524 U.S. at 431 n. 19 (where one party has standing the court "need not consider" the standing issue as to the other plaintiffs); *Bowsher v. Synar*, 478

U.S. 714, 721 (1986) (same). nonetheless, GAHT-US does have standing.

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth*, 528 U.S. at 181 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). As demonstrated above, Plaintiffs Gingery and Koichi Mera have standing as individual Plaintiffs because they have sustained emotional injuries and have stated that they "would like to use Glendale's Central Park and its Adult Recreation Center," but, as a result of alienation due to the monument and plaque, they avoid doing so. (ER 55-56, ¶8.) Because Gingery and Mera have standing, and are members of GAHT-US, GAHT-US also has standing. *Id.*; *Hunt*, 432 U.S. at 342–43.[5]

Glendale's "unfairly biased portrayal of the Japanese government" has caused many of GAHT-US's members to also "suffer feelings of exclusion, discomfort, and anger by the continued presence of the monument, and the controversial and disputed stance on the debate surrounding Comfort Women that it perpetuates." (ER 55, ¶7.) Because of the monument and plaque, local GAHT-US members no longer feel

---

[5] In the event this Court finds that the individual Plaintiffs did not suffer injury-in-fact, Plaintiff Gingery has taxpayer standing to support GAHT-US's standing, in which case this Court still need not reach the standing of the other Plaintiffs. *Clinton*, 524 U.S. at 431 n.19.

comfortable using Central Park and the facilities located in it. (*Id.*)

The interests at stake in this lawsuit—the local, global, and political implications of Glendale's interference in foreign relations between the United States, Korea, and Japan—are completely germane to the organizational purpose of GAHT-US, which is to provide educational resources "concerning the history of World War II and related events, with an emphasis on Japan's role," and to "enhance a mutual historical and cultural understanding between and among the Japanese and American people." (ER 55, ¶7.)

Finally, GAHT-US's individual members will not need to participate in this litigation because only declaratory and injunctive relief is sought. *See Alaska Fish & Wildlife Federation and Outdoor Council, Inc. v. Dunkle*, (9th Cir. 1987) 829 F.2d 933, 938 (finding standing "because the [organization] seeks declaratory and prospective relief rather than money damages [and thus] its members need not participate directly in the litigation").

D. The District Court Erroneously Concluded that There Was No Standing

Even though Plaintiffs have standing under well-established case law, the district court erroneously dismissed the case for lack of standing. The district court reasoned that "[t]he fact that local residents feel disinclined to visit a local park is simply not the type of injury that can be considered to be in the 'line of causation' for alleged violations of the foreign affairs power and Supremacy clause." (ER 23 (emphasis added).) The district court provided no citation or support for this illogical and incorrect assertion.

Under *Barnes-Wallace*, a plaintiff that avers emotional injury and loss of enjoyment or use of public land plainly has standing to challenge unconstitutional actions by a city whatever the cause of action pled might be. 530 F.3d at 784. The focus for standing purposes is not on how the plaintiff pleads the case in terms of a cause of action, but rather on what the injury is that is alleged by the plaintiff. The district court inappropriately conflated the standards for an injury-in-fact that must be shown for Article III standing purposes with the showing necessary to establish Plaintiffs' claim on the merits. To affirm the district court's rationale risks creating an illogical and new standing doctrine in this Circuit where the merits of the underlying claim matter for purposes of injury-in-fact. However, this Court has been clear that "[w]hether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits." *Tyler v. Cuomo*, 236 F.3d 1124, 1133 (9th Cir. 2000) (quoting *Louisiana Energy & Power Auth. v. Federal Energy Regulatory Comm'n*, 141 F.3d 364, 368 (D.C. Cir. 1998)). The determination whether Article III standing exists should not be influenced by some sort of pre-judgment about the merits and, in any event, is prohibited by *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93–97 (1998), which holds that a court must determine that it *has* jurisdiction before reaching the merits.

More so, despite striking similarities between Plaintiffs' case and this Court's decision in *Barnes-Wallace*, the district court improperly tried to distinguish that case as creating a unique rule for standing in Establishment Clause cases. As explained

above, however, this Court in *Barnes-Wallace* was clear that its rationale applied beyond cases challenging religious displays on public lands. *Barnes-Wallace*, 530 F.3d at 784–86 & n. 6. Indeed, the Court there cited not only Establishment Clause cases but also environmental cases to support its standing rationale. The types of claims pled in *Barnes-Wallace* were irrelevant, as they should be under this Court's case law, to the determination of injury-in-fact.

Next, the district court sought to label this case as one raising a generalized grievance. Without any analysis, the district court cited *Caldwell v. Caldwell*, 545 F.3d 1126 (9th Cir. 2008), for the conclusion that the harm complained of here "is no more than an 'abstract objection'" and, therefore, there is "too slight a connection between [plaintiff's] generalized grievance, and the government conduct." (ER 23.)

However, *Caldwell* is distinguishable. In *Caldwell*, this Court held that a plaintiff lacked standing to raise an Establishment Clause claim arising from a discussion of religious views on a University of California website—a single section out of more than 800 pages. 545 F.3d at 1128–29. The plaintiff alleged that the website "endorses beliefs which hold that religion is compatible with evolutionary theory and disapproves of beliefs, such as her own, that are to the contrary, thereby exposing her to government endorsed religious messages and making her feel like an outsider." *Id.* at 1228. This Court held that "there is too slight a connection between [plaintiff's] generalized grievance, and the government conduct about which she complains" because she failed to allege any specific harm connected with the direct exposure to unwelcome religious material. *Id.* at 1133. In reaching

this conclusion, this Court highlighted the fact that neither the plaintiff nor her children had been exposed to the unwelcome discourse in the classroom. *Id.* Indeed, all the plaintiff there could aver was that she, as a parent, was "offended" by the website's portrayal of evolutionary theory and that she was "made to feel like an outsider[]" because upon accessing the website (which the University of California had made accessible to the public) she was "exposed to government-endorsed religious messages to her harm." *Id.* at 1130. Importantly, the plaintiff in *Caldwell* did not aver that she was unable to use the website or any other public land or service on account of the message conveyed. *Id.*

Unlike *Caldwell*, Plaintiffs' injury here is more than an abstract disagreement with one page of an 840 page website hosted by a public university. In this case, Plaintiffs objected to Glendale's decision to install the monument and expressed their disagreement at City Council meetings well before filing suit. (ER 61-62, ¶¶28, 31-32.) After the monument and plaque were installed, Plaintiffs avoided using Central Park despite their stated wish to make use of that land and its facilities. Their injuries are much more than an "abstract objection" because of their proximity to Central Park, their status as Japanese-Americans, and their stated personal interest in using and inability to use the land at issue. *See Barnes-Wallace*, 530 F.3d at 785; *cf. Caldwell*, 545 F.3d at 1133 ("[Plaintiffs] asserted interest—informed participation as a citizen in school board meetings, debates, and elections, especially with respect to selection of instructional materials and how teachers teach the theory of evolution in biology classes in the public

schools—is not sufficiently differentiated and direct to confer standing on her[.]"). Even if *Caldwell* were on point, *Barnes-Wallace* is the standing law of this Circuit. *See Barnes-Wallace*, 704 F.3d at 1078 (explaining that *Caldwell*, "as a decision by a later three-judge panel, cannot by its own force overrule this panel's prior opinion [in *Barnes-Wallace*.]").

The district court determined that Plaintiffs were not the appropriate plaintiffs to bring a foreign affairs preemption claim against Glendale. Yet, the law of this Circuit is clear that so long as the plaintiffs, as here, suffer an injury-in-fact then they have standing to sue regardless of how the district court views the merits.

III. THIS COURT SHOULD FIND STANDING AND REACH THE MERITS

Once the district court held that it lacked standing, it had no power to reach the merits of the case. Here, the district court incorrectly assumed hypothetical jurisdiction and inappropriately sought to rule on the merits. Specifically, the district court stated: "Even if Plaintiffs possessed Article III standing, dismissal is still appropriate because Plaintiffs have failed to allege facts . . . to support a conclusion that the Comfort Women monument in Glendale's Central Park . . . violates the Supremacy Clause or foreign affairs power." (ER 25.) The district court's ruling on the sufficiency of plaintiffs' claims therefore exceeded its jurisdiction. *See, e.g.*, *Steel Co.*, 523 U.S. at 101–02; *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006).

While as a general matter, a "dismissal for failure to state a claim may be affirmed on any basis supported

in the record," *Public Util. Dist. No 1 v. IDACORP Inc.*, 379 F.3d 641, 646 (9th Cir. 2004) (emphasis added), there is appellate jurisdiction to do so only where the district court *exercised* jurisdiction to determine the complaint's sufficiency to state a claim, *Steel Co.*, 523 U.S. at 94, 101. Here, the district court could not do so because when it denied standing it no longer had jurisdiction to reach the merits. *Id.* at 94–95.

Thus, in the normal course of events, this Court would reverse the district court's standing determination and remand for further proceedings. This case is unique, however, because the district court has already signaled what it will do on remand. While an appellate court should not address the merits of *new* claims not actually decided below, *Singleton v. Wulff*, 428 U.S. 106, 119–21 (1976), it is an appropriate exercise of appellate jurisdiction for this Court to find standing and resolve the Rule 12(b)(6) motion in favor of Plaintiffs where the claims have been fully briefed and are ripe for review. In doing so, no deference whatsoever should be given to the district court's hypothetical judgment on the merits. *See Steel Co.*, 523 U.S. at 101 ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment[.]").

The Supreme Court has held that the practice of limiting appellate review to questions decided below serves two purposes: (1) preserving the trial court's "authority to determine questions of fact" and (2) preventing the parties from being "surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Where these policies are not implicated, the appellate court is not bound by the practice, which is "devised to

promote the ends of justice, not to defeat them." *Id.* at 557.

Neither of the purposes of limiting appellate review is served in this case, where this Court is asked to decide: (1) a purely legal question that (2) was raised in the court below (indeed, the district court tried to resolve the issue) and is being comprehensively briefed by both sides in this Court. There is no possibility of Defendants-Appellees here being unfairly "surprised" by appellate consideration of the constitutional issues here. Remanding this constitutional merits issue to the district court would accomplish nothing other than to delay justice and needlessly prolong substantial uncertainty.

This Court has held that it has discretion to consider a merits issue for the first time on appeal when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case, especially in cases where the Supremacy Clause is alleged to prohibit governmental action. *Kimes*, 84 F.3d at 1126. That description fits this case and is even more appropriate here because none of the merits arguments are being raised for the first time on appeal. Therefore, should this Court hold that Plaintiffs have standing, it should proceed to resolve the 12(b)(6) issue in favor of Plaintiffs.

IV. THE POLITICAL-QUESTION DOCTRINE DOES NOT BAR THIS LAWSUIT

The political-question doctrine is "primarily a function of separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the

business of the other branches of Government[.]" *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In *Baker*, the Supreme Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as relevant here, "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217. To determine whether "one of these formulations" is applicable, this Court must engage in a "discriminating inquiry into the precise facts and posture of the particular case." *Id.* The basic principle of the political-question doctrine is that where resolving a legal claim would require an evaluation of quintessentially Executive Branch or Legislative Branch policy, the claim is nonjusticiable under the political-question doctrine. This is not such a case for the following reasons.

First, this Court is not being asked to pass judgment on the content of U.S. foreign policy. Indeed, this Court can decide this dispute without questioning the wisdom of U.S. foreign policy. This is so because the question presented is whether under the U.S. Constitution Glendale can make its own foreign policy regarding Japan by erecting and maintaining the monument and plaque. As this Court recently held in *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012) (en banc), "even when the

federal government has taken no action on a particular foreign policy issue, the state [or a municipality, such as Glendale] generally is not free to make its own foreign policy on that subject." Reaching the same conclusion in this case in no way requires the Court to interfere with other branches of government or pronounce on U.S. foreign policy.

Second, Plaintiffs submit that the political-question doctrine is inapplicable to a case raising a foreign affairs preemption claim where the actions of a state or municipality are being challenged. Indeed, there are numerous cases, including Supreme Court and Ninth Circuit, that have proceeded to the merits on foreign affairs preemption claims. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401–12 (2003) (holding unconstitutional a California statute directing production of Holocaust-era insurance policies); *Deutsch v. Turner Corp.*, 324 F.3d 692, 712–16 (9th Cir. 2003) (holding unconstitutional a California statute extending statute of limitations for claims by World War II slave laborers).

Third, the appropriate use of the political-question doctrine in a case such as this can be seen in the case of *Joo v. Japan*, a case where the U.S. government urged the court to dismiss a lawsuit filed by former Comfort Women against Japan on political-question grounds. 413 F.3d 45, 48–53 (D.C. Cir. 2005). The *Joo* plaintiffs, former Comfort Women who were nationals of China, Korea, the Philippines, and Taiwan, sought monetary relief through private litigation against Japan, arguing that their individual claims were not extinguished by treaties executed between their respective governments and Japan. *Joo*, 413 F.3d at 46. The court decided that, in light of the Executive

Branch's primary authority in this area, interpretation of those treaties was appropriately delegated to the Executive Branch because "adjudication by a domestic court not only 'would undo' a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan's 'delicate' relations with China and Korea, thereby creating 'serious implications for stability in the region.'" *Id.* at 52. Critically, the United States urged that result in *Joo* because the adjudication of the plaintiffs' claims would require the court "to judge the policy considerations underlying the drafting, negotiation and ratification" of the U.S. treaty with Japan that ended World War II. (ER 38.) The political-question doctrine was applicable there because a court was being asked to judge the policy of the federal government in the area of foreign affairs.

In contrast, in no way is this Court being asked to judge U.S. foreign policy. Instead, this Court is being asked to determine whether the Constitution's allocation of the foreign affairs power prevents Glendale, notwithstanding Japan's objection and without the consent of the federal government, to inject itself into a contested area of foreign affairs. Confirming our view of the law, the United States has recently taken the position that the political-question doctrine is not applicable in a case where the court need not "question[] the wisdom" of U.S. foreign policy in resolving a claim that state tort law is preempted by the foreign affairs power. Brief of the United States as *Amicus Curiae* at 7–8, *KBR, Inc. v. Metzgar*, No. 13-

1241, 2015 WL 231968 (U.S. Jan. 20, 2015).[6] That is the case here.

V. GLENDALE'S ACTION IS PREEMPTED BY THE FEDERAL GOVERNMENT'S AUTHORITY TO REGULATE FOREIGN AFFAIRS

Under the U.S. Constitution, "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). That is because "for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889). As a result, "the Supreme Court has long viewed the foreign affairs powers . . . as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government." *Deutsch*, 324 F.3d at 709; *see also Garamendi*, 539 U.S. at 413–14. Attempts by state or local governments to involve themselves in foreign policy matters necessarily constitute "an intrusion . . . into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig v. Miller*, 389 U.S. 429, 432 (1968). Municipalities are subject to the same limitations as states because neither is afforded any role whatsoever in defining foreign policy. *See Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of

---

[6] A true and correct copy of this brief is attached as Exhibit B to the Declaration of Maxwell M. Blecher in Support of Plaintiffs' Motion To Take Judicial Notice filed concurrently herewith, and also available at *KBR, Inc. v. Metzgar*, 2014 WL 7185601 (U.S.).

the people of the whole nation, imperatively requires the federal power in the field of foreign relations to be left entirely free from local interference."). Glendale's installation and maintenance of the monument and plaque runs afoul of these constitutional requirements.

A. The Constitution Preempts Municipal Action that Interferes with Foreign Policy

It is firmly-established that a private party may bring a claim alleging that state or municipal action is preempted by the Constitution. *See, e.g.*, *Garamendi*, 539 U.S. at 413–14; *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372–73 (2000); *Foster v. Love*, 522 U.S. 67, 70–72 (1997); *Gade v. Nat'l Solid Wastes Mgmt. Assn*, 505 U.S. 88, 96 (1992). State or municipal action must not be permitted to "distort[] the allocation of responsibility to the national government for the conduct of American diplomacy." *In re World War II Era Japanese Forced Labor Litig.*, 164 F.Supp.2d 1160, 1168 (N.D. Cal. 2001) (internal quotations omitted), *aff'd sub nom. Deutsch*, 317 F.3d 1005, *opinion amended and superseded on denial of reh'g*, 324 F.3d 692 (9th Cir. 2003). This principle is of such importance that "'even in the absence of a treaty' or federal statute, a state may violate the constitution by 'establish[ing] its own foreign policy.'" *Deutsch*, 324 F.3d at 709 (quoting *Zschernig*, 389 U.S. at 441).

The Supreme Court has repeatedly recognized that state action in conflict with the federal government's exercise of its foreign relations and war powers is preempted. *See Garamendi*, 539 U.S. at 420–21; *Zschernig*, 389 U.S. at 440; *Pink*, 315 U.S. at 230–31. Even in the absence of such a conflict, however, the

Supreme Court has indicated that state action is preempted if it intrudes "into the field of foreign affairs." *Zschernig*, 389 U.S. at 432; *see also Hines*, 312 U.S. at 63 ("Our system of government. . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

Following this precedent, this Court has recognized that the Constitution "gives the federal government the exclusive authority to administer foreign affairs." *Movsesian*, 670 F.3d at 1071 (emphasis added). "Under the foreign affairs doctrine, state laws that intrude on this exclusively federal power are preempted." *Id.* (citing *Garamendi*, 539 U.S. at 418–20).

As this Court has explained, there are two types of foreign affairs preemption: conflict preemption and field preemption. "Under conflict preemption, a state law must yield when it conflicts with an express federal foreign policy." *Movsesian*, 670 F.3d at 1071. "But the Supreme Court has made clear that, even in the absence of any express federal policy, a state law still may be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility. This concept is known as field preemption or 'dormant foreign affairs preemption.'" *Id.* at 1072.

When analyzing a case for field preemption, this Court's *Movsesian* decision directs this Court to ask whether a state or municipality has "addressed a traditional state responsibility" or has instead "intruded on a power expressly or impliedly reserved by the Constitution to the federal government." *Movsesian*, 670 F.3d at 1074. In so doing, this Court must look to

determine the "real purpose" of the state or municipal action. *Id.* at 1075 (quoting *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010)). Glendale has acted beyond any area of traditional responsibility and has impermissibly intruded on the federal government's foreign affairs power by injecting itself into a contested area of foreign affairs.

B. Under this Court's *Movsesian* Decision, Glendale's Actions Are Preempted Because They Do Not Concern an Area of Traditional State Authority

Glendale's actions in installing the monument and plaque attempt to establish foreign policy and disturb foreign relations in a deeply contested international arena between Japan and South Korea without addressing any traditional area of state or municipal responsibility. The Comfort Women issue continues to be a highly charged international debate that has not yet remotely been resolved to the satisfaction of the nations involved. (ER 59, ¶¶15-18.) As Plaintiffs' Complaint details, "[d]isagreements concerning responsibility for Comfort Women are a major impediment to improved present-day relations between Japan and South Korea, which are less than cordial" (ER 59, ¶18), and the United States, even as recently as February 2013, has continued to encourage Japan and South Korea to "work together to resolve their concerns over historical issues in an amicable way," and to "put history behind them and move the relationship forward." (ER 64-65, ¶¶46-47.) The implications of the global discourse on the Comfort Women issue, including the actions or omissions of Japan as a foreign government, do not in any way

touch on any traditional municipal responsibility of Glendale. *See Von Saher*, 592 F.3d at 965 (providing a forum for Holocaust restitution claims, while "a laudable goal, it is not an area of 'traditional state responsibility,' and the statute is therefore subject to a field preemption analysis."); *Movsesian*, 670 F.3d at 1076 (extending insurance claim statute of limitations for victims of the Armenian Genocide did not concern an area of traditional state responsibility); *Garamendi*, 539 U.S. at 425 (no state interest in "regulating disclosure of European Holocaust-era insurance policies"); *see also Zschernig*, 389 U.S. at 440 ("The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy.").

Because the Comfort Women issue is a matter of continuing international relations controversy and negotiation unrelated to Glendale's local "traditional" responsibilities, Glendale simply cannot be permitted to infringe upon the federal government's exclusive authority to conduct foreign relations with and between Japan and South Korea. *Japan Line, Ltd. v. Los Angeles Cnty.*, 441 U.S. 434, 455 (1979) ("California may not tell this Nation or Japan how to run their foreign policies."). Glendale is a small municipal government with local concerns, and has no stake of any kind in controversies between South Korea and Japan arising out of World War II.

Importantly, the monument and plaque here challenged do much more than commemorate; they advocate that Japan violated international human rights during World War II and also advocate that the

present day government of Japan accept responsibility and make amends for alleged activities that occurred during World War II. Thus, while this Court has not "offer[ed] an opinion," and thus left open the question, whether there are circumstances where foreign affairs preemption would be appropriate in a case where "California [] express[ed] support for Armenians by, for example, declaring a commemorative day," *Movsesian*, 670 F.3d at 1077 n.5, there is no authority holding "that a state [or municipal] government's First Amendment interests, if any, should weigh into a consideration of whether a state has impermissibly interfered with the federal government's foreign affairs power," *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 62 (1st Cir. 1999), *aff'd on other grounds*, 530 U.S. 263 (2000). Glendale's arguments before the district court that purely expressive conduct is not subject to foreign affairs preemption is supported by no authority. Indeed, it violates logic. Just as a city cannot erect a monument that violates the Establishment Clause by expressing the position that, for example, "This is a Christian government," so too it cannot erect a monument and plaque that violates the Supremacy Clause. By way of another example, had Glendale installed a monument and plaque that expressed the view that "Glendale commemorates the valiant efforts of ISIL's freedom fighters against the United States," it is our position that under governing precedent this would be preempted under the foreign affairs power because it unconstitutionally intrudes upon the President's foreign affairs and war powers. Since in at least some circumstances mere commemoration and purely expressive conduct can be preempted by the foreign affairs power, the monument and plaque here, which is much more than

commemorative because it sides against Japan and advocates that the present-day government of Japan accept historical responsibility on contested foreign affairs matters and make amends, is likewise subject to foreign affairs preemption.

To be clear, the monument and plaque seek to establish foreign policy by taking sides, casting blame on Japan, and pressuring Japan to "accept historical responsibility for these crimes." This Glendale cannot do. *See Zschernig*, at 441 (even in the absence of a conflicting federal policy, a state may violate the Constitution by "establish[ing] its own foreign policy"); *see also Japan Line*, 441 U.S. at 455 ("California may not tell this Nation or Japan how to run their foreign policies.").

Lest there be any doubt, the "real purpose" of Glendale's action here was to unconstitutionally inject itself into foreign affairs and not some alleged traditional municipal purpose of merely expressing an opinion. Glendale's then-mayor, Dave Weaver, conceding that Glendale's installation of the monument and plaque was improper, stated in a letter to Yoshikazu Noda, Mayor of Higashiosaka, Japan, that the dispute over Comfort Women "is an international one between Japan and South Korea and the City of Glendale should not be involved on either side." (ER 62, ¶32.)

Indeed, when the monument was being considered by the City Council, then-Councilmember Zareh Sinanyan, now Glendale's mayor, made clear that Glendale intended to insert itself into foreign affairs notwithstanding his expressly acknowledged understanding that such action violated this Court's clear

case law. Addressing the questionable authority of Glendale to approve the monument, Sinanyan stated:

> Another argument [is that] Glendale has no authority to do anything about this issue, it's a federal issue. Just last year, the Turkish government pushed a lawsuit which they succeeded on in the Ninth Circuit making the exact same argument, saying that the recognition of the Armenian genocide by state authorities was not proper [presumably referring to this Court's *Movsesian* case] . . . I'm sorry it's a moral issue, not a state issue. . . We are taking a meaningful step to show our moral support, our sharing of the pain that our Korean brothers and sisters feel about this issue . . .[7]

Of course, even if it is "a laudable goal, it is not an area of traditional state responsibility." *Von Saher*, 592 F.3d at 965. Sinanyan's presumptive reference to this Court's *Movsesian* decision clearly shows that he and presumably others on Glendale's City Council knew that in approving the monument they were injecting Glendale into foreign affairs notwithstanding this Court's clearly established case law prohibiting such action.

Even if Glendale did have some local stake in this international dispute spanning 70 years, which it does not, field preemption would require that its interest yield to the federal government's command of foreign affairs because "our system of government is such that

---

7 *See* Plaintiffs-Appellants' Motion To Take Judicial Notice filed concurrently herewith, and Plaintiffs-Appellants' Motion To File Physical Exhibit, filed on February 27, 2015 (Doc. # 15).

the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63. Field preemption is especially applicable here where there is an absence of any local government interest that Glendale may be able to cobble together related to the Comfort Women issue. *Garamendi*, 539 U.S. at 425 ("If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter . . . ").

C. Under *Movsesian*, Glendale's Actions Are Preempted Because They Intrude on Powers Reserved to the Federal Government by Seeking to Establish Foreign Policy Regarding Comfort Women

Glendale's intrusion on the federal government's exclusive power to conduct foreign affairs has had much "more than some incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 434–35 (internal quotations omitted). Indeed, the monument and plaque express a distinct point of view by taking sides "with [its] Korean brothers and sisters" and casting blame on Japan on a specific matter of foreign policy. The monument and plaque seek to establish a foreign policy position, whereby the Japanese government is encouraged to "accept historical responsibility for these crimes" at the behest of Glendale. *See id.* at 441 (holding that, even in the absence of a conflicting federal policy, a state may violate the Constitution by "establish[ing] its own foreign policy"). Glendale has

engaged in highly charged advocacy and condemnation of a foreign government's disputed wartime conduct, which it cannot, and should not be allowed to, do under the Constitution. *See id.* at 435–36 (finding preempted an Oregon statute because it invited courts to engage in an analysis of foreign governments and their conduct).

There is no doubt that Glendale's actions have compelled officials at nearly every level of government in Japan to openly criticize Glendale's actions and its contested position on the Comfort Women issue. In fact, the monument and plaque have been met with vehement disapproval from officials from the highest levels of the Japanese government. Japan's Prime Minister, Japan's Chief Cabinet Secretary, and Japan's Ambassador to the United States have all publicly commented on and condemned Glendale actions regarding the monument and plaque. (ER 63-64, ¶¶36-42.) For example, shortly after the installation of the monument and plaque, the Japanese Ambassador to the United States, Kenichiro Sasae, stated that that the position espoused by Glendale in the in the monument and plaque is "irreconcilable" with the position of the Government of Japan and is "highly regrettable." (ER 63, ¶39.) The same day, Yoshihide Suga, Japan's Chief Cabinet Secretary, described Glendale's conduct as "conflict[ing] with the [Japanese] government's view that the issue of the Comfort Women should not be part of any political or diplomatic agenda." (*Id.*, ¶40.) Two weeks later, Japanese Prime Minister Shinzo Abe

stated that he was "extremely dissatisfied" with Glendale's decision.[8] (*Id.*, ¶41.)

Glendale's actions risk the United States' relationship with both Japan and South Korea, and have contributed to the continued animosity and unresolved tension between Japan and South Korea on the issue of Comfort Women. In an international context, "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." *Hines*, 312 U.S. at 64. The Supreme Court has long recognized that the potential to disrupt foreign affairs is especially probable—even for seemingly benign issues on a domestic level—because of the volatility of such issues when magnified on an international scale. *Japan Line*, 441 U.S. at 456 ("This case concerns foreign commerce. Even a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned.").

---

[8] Since Plaintiffs-Appellants' Complaint was filed on February 20, 2014, Japan's Chief Cabinet Secretary released a question and answer press statement concerning the monument and plaque in which he stated: "This installation of a memorial statue by a municipal government in the U.S. is incompatible with the views of the Japanese Government." Press Conference by the Chief Cabinet Secretary, Feb. 21, 2014, *available at* http://japan.kantei.go.jp/tyoukanpress/201402/21_p.html, a true and correct copy of which is attached to as Exhibit A to the Declaration of Maxwell M. Blecher in Support of Plaintiffs-Appellants' Motion To Take Judicial Notice filed concurrently herewith.

Whether the wrongs are "imagined" or not, the Comfort Women issue strikes at the core of Japan's and South Korea's wartime legacies on delicate issues such as prostitution and sexual slavery—fragile subjects for even the strongest of allies to traverse in a sensitive and appropriate fashion. Glendale's uninvited incursion into international and diplomatic relations not only has the "great potential for disruption or embarrassment" for the United States, *Zschernig*, 389 U.S. at 434–35, but negatively affects the strain between Japan and South Korea, and risks the relationship between the United States and both countries. This Glendale cannot be permitted to do.

D. The District Court's Merits Discussion Is Entitled to No Deference and, in Any Event, Is Wrong

As noted above, the district court's "merits" discussion is entitled to no deference because it was based on hypothetical subject matter jurisdiction. In any event, the district court applied the wrong legal standard.

As already explained, field preemption prevents Glendale from installing and maintaining this monument and plaque. The district court made much of the fact that the plaque's language encouraging Japan to issue a formal apology echoes the language of House Resolution 121, which Congress passed in July 2007. (ER 25.) It matters not that Glendale seemingly acted based on a legally nonoperative resolution of one house of Congress. As this Court has explained, whether the state action challenged is in accord with the actions of some federal officials is irrelevant to the analysis. *Hines*, 312 U.S. at 61

(finding preemption even though "[t]he basic subject of the state and federal laws is identical[.]"); *Crosby*, 530 U.S. at 379–80 ("The fact of a common end hardly neutralizes conflicting means[.]"); *Gade*, 505 U.S. at 103 (accord). This Court also confirmed this view in *Movsesian*:

> The statute expresses a distinct political point of view on a specific matter of foreign policy. It imposes the politically charged label of 'genocide' on the actions of the Ottoman Empire (and, consequently, present-day Turkey) and expresses sympathy for Armenian Genocide victims. The law establishes a particular foreign policy for California—one that decries the actions of the Ottoman Empire and seeks to provide redress for Armenian Genocide victims . . . .

670 F.3d at 1076 (internal quotations and citations omitted).

Here, the situation is identical and even more problematic. Field preemption precludes Glendale from expressing a distinct political point of view on a specific matter of foreign policy by using emotionally-charged language explicitly directed at a foreign government.

Importantly, this is not the standard type of monument erected by a local government, such as one commemorating a U.S. war hero, a police officer lost in the line of duty, or a local citizen's role in city beautification. This is a monument where Glendale is advocating that Japan take "responsibility" for alleged human rights violations that allegedly occurred during World War II. Indeed, this is in no way a matter of

traditional municipal responsibility, such as maintaining streets and transportation services and providing other local public services.[9] Glendale has no constitutional authority to install and maintain a monument and plaque to stand as the moral compass for the United States or the world when it comes to foreign policy.

Finally, the district court noted that a holding in favor of Plaintiffs "would invite unwarranted judicial involvement in the myriad symbolic displays" undertaken by local governments and impinge upon the local government's right to "communicate with the citizenry." (ER 25-26, citing *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1415 (9th Cir. 1996)). This argument is a red herring, because, as noted above, this is not mere commemoration but advocacy directed at the Japanese government.

---

9 As for Glendale's definition of its traditional local interests, see Glendale's Code of Ordinances, a true and correct copy of which is attached to the Declaration of Maxwell M. Blecher in support of Plaintiffs-Appellants' Motion To Take Judicial Notice filed concurrently herewith, and also available at https://www.municode.com/library/ca/glendale/codes/code_of_ordinances. The Code of Ordinances lists the following areas of governance: Titles 4 (Local Revenue and Finance), 5 (Business Taxes, Licenses and Regulations), 6 (Animals), 8 (Health and Safety), 9 (Public Peace and Welfare), 10 (Vehicles and Traffic), 12 (Streets, Sidewalks and Public Places), 13 (Public Services), 15 (Buildings and Construction), 16 (Subdivisions) and 30 (Zoning). Nowhere does the Code provide for Glendale to police or govern foreign nations, or even to urge them to accept responsibility for alleged international human rights violations, particularly foreign nations today allied with the U.S., or to provide this country, any other country, or the world with moral or ethical directives.

A municipality has no right to "speak" in such a manner as to interfere with foreign affairs. *Nat'l Foreign Trade Council*, 181 F.3d at 61 (Nothing "suggests that a state government's First Amendment interests, if any, should weigh into a consideration of whether a state has impermissibly interfered with the federal government's foreign affairs power."). Glendale does not have "free license to communicate offensive or partisan messages," and its speech is clearly limited by the Constitution. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468, 482 (2009); *see also R.J. Reynolds Tobacco Co. v. Bonta*, 272 F.Supp.2d 1085, 1106 (E.D. Cal. 2003) *aff'd sub nom. R.J. Reynolds Tobacco Co. v. Shewry*, 384 F.3d 1126 (9th Cir. 2004) *opinion amended and superseded on denial of reh'g*, 423 F.3d 906 (9th Cir. 2005) ("[I]t is to be hoped that the courts will recognize that limitations, both constitutional and otherwise derived, constrain the government's power to speak on controversial issues."); *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) ("Even if municipalities do have First Amendment rights, however, a question we need not decide, we do not think they have the right to foment, whether through speech or otherwise, governmental discrimination on grounds of race."); *Adams v. Maine Municipal Ass'n*, 2013 WL 9246553, at *19 (D. Me., Feb. 14, 2013) ("If government speech is discriminatory, it might be challenged under the Equal Protection Clause . . . Even when a challenge is brought under the Free Speech Clause, the government speech doctrine's protections appear to be limited."); *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003, 1007 (9th Cir. 2000) (the government can and should regulate its own speech when it is "'disrespectful,' 'offensive,' 'upsetting,' 'objectionable,'

and 'derogatory.'"). Just as a municipality cannot erect a monument that violates the Establishment Clause, so too it cannot erect a monument and plaque that violates the Supremacy Clause.

Furthermore, affirming the district court's illogical reasoning would mean that federal courts in this Circuit could not evaluate whether all manner of arguable speech by local governments accords with the Constitution. Just as it is not constitutionally permissible under the Establishment Clause for a local government to communicate to its citizenry that it is a Christian government and impermissible under Equal Protection for a local government to communicate that minorities, immigrants, or a particular race are inferior to others in the local community, so too is it impermissible under the Constitution for a local government to take a contested position on a matter of foreign affairs and advocate that a foreign government accept responsibility for its alleged crimes during World War II.

According to the district court, to hold for Plaintiffs here would mean that "those who may harbor some factual objection to the historical treatment of a state or municipal monument to the victims of the Holocaust could make similar claims to those advanced by Plaintiffs in this action." (ER 25.) This assumption is misplaced. The atrocities committed during the Holocaust are not subject to any serious debate, do not conflict with U.S. foreign policy, nor would a statement regarding the horrors of the Holocaust necessarily draw the protest of the German government. Furthermore, war crimes that occurred during the Holocaust have been adjudicated by an international tribunal, apologies have been issued, reparations have been paid, and Germany does not deny wrongdoing.

More so, Germany's horrific actions against Jewish and other people during the Holocaust have not been a controversial issue of global politics for several decades. This is not true for the Comfort Women debate, as Japan's strenuous objection to this monument and plaque and the lack of scholarly consensus make plain.

Glendale's actions are also more than merely commemorative because it has installed a 1,100 pound permanent monument that monopolizes "the use of the land on which [it] stand[s] and interfere[s] permanently with other uses of public space." *Pleasant Grove*, 555 U.S. at 479. As Glendale's then-Mayor and current Mayor explained, the monument and plaque take a side on foreign affairs—a deeply contested side—in the debate against an important U.S. ally and proceed to adjudicate the blameworthiness of Japan and the Japanese people for wartime activities in World War II.

This monument and plaque, as well as the district court's judgment, should not be allowed to stand.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that the judgment of the district court be reversed as requested herein.

Respectfully submitted,

The Law Offices of Ronald S. Barak

Blecher Collins Pepperman & Joye
Maxwell M. Blecher
Donald R. Pepperman
Taylor C. Wagniere

By: /s/ Maxwell M. Blecher
Attorneys for
Plaintiffs-Appellants

Dated: March 13, 2015

SECOND AMENDED COMPLAINT TO THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, CENTRAL JUDICIAL DISTRICT, FOR DECLARATORY AND INJUNCTIVE RELIEF (OCTOBER 26, 2015)

FOR

(1) UNCONSTITUTIONAL INTERFERENCE WITH FOREIGN AFFAIRS POWER (IN VIOLATION OF *MOVSESIAN V. VICTORIA VERSICHERUNG AG* (9TH CIR. 2012) 670 F.3D 1067);

(2) VIOLATION OF THE GLENDALE MUNICIPAL CODE;

(3) VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE CALIFORNIA CONSTITUTION; AND

(4) VIOLATION OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE CALIFORNIA CONSTITUTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MICHIKO SHIOTA GINGERY, an individual, KOICHI MERA, an individual, GAHT-US CORPORATION, a California non-profit corporation; and MASATOSHI NAOKI, an individual

Plaintiffs,

v.

CITY OF GLENDALE, a municipal corporation, and DOES 1 through 20, inclusive,

Defendants.

Case No.: BC556600

Second Amended Complaint for Injunctive and Declaratory Relief for:

(1) Unconstitutional interference with foreign affairs power (in violation of *Movsesian v. Victoria Versicherung AG* (9th Cir. 2012) 670 F.3d 1067);

(2) Violation of the Glendale Municipal Code;

(3) Violation of the Equal Protection Clause of the California Constitution; and

(4) Violation of the Privileges and Immunities Clause of the California Constitution

Plaintiffs MICHIKO SHIOTA GINGERY, an individual, KOICHI MERA, an individual, GAHT-US CORPORATION, a California non-Profit Corporation, and MASATOSHI NAOKI, an individual, (collectively "Plaintiffs") hereby complain against Defendant and allege as follows:

BACKGROUND ON OFFENSIVE PUBLIC MONUMENT

1. Plaintiffs seek relief relating to the presence of a monument located in Glendale's public park and authorized by Glendale, which condemns the nation of Japan, and by implication, all persons of Japanese origin and descent, regarding individuals that have come to be known as "Comfort Women" (the "Public Monument"). During World War II and the decade leading up to it, an unknown number of women from

Japan, Korea, China, and a number of nations in Southeast Asia, were recruited, employed, and/or otherwise acted as sexual partners for troops of the Japanese Empire in various parts of the Pacific Theater of war. These women are now referred to as "Comfort Women."

2. At a Special Meeting on July 9, 2013, the City Council of Glendale approved the installation of the Public Monument, described as "a Korean Sister City 'Comfort Woman' Peace Monument," on a substantial portion of public land immediately adjacent to the Adult Recreation Center Plaza in Central Park. The text on a plaque permanently affixed to the Public Monument reflects an explicitly pro-Korean and anti-Japanese view of historical events during World War II related to "Comfort Women" that are still vigorously contested and debated in Asia and in the United States. The text on the Public Monument's plaque states:

"I was a sex slave of Japanese military

- Torn hair symbolizes the girl being snatched from her home by the Imperial Japanese Army.
- Tight fists represent the girl's firm resolve for a deliverance of justice.
- Bare and unsettled feet represent having been abandoned by the cold and unsympathetic world.
- Bird on the girl's shoulder symbolizes a bond between us and the deceased victims.

- Empty chair symbolizes survivors who are dying of old age without having yet witnessed justice.
- Shadow of the girl is that of an old grandma, symbolizing passage of time spent in silence.
- Butterfly in shadow represents hope that victims may resurrect one day to receive their apology.

Peace Monument

In memory of more than 200,000 Asian and Dutch women who were removed from their homes in Korea, China, Taiwan, Japan, the Philippines, Thailand, Vietnam, Malaysia, East Timor and Indonesia, to be coerced into sexual slavery by the Imperial Armed Forces of Japan between 1932 and 1945.

And in celebration of proclamation of "Comfort Women Day" by the City of Glendale on July 30, 2012, and of passing of House Resolution 121 by the United States Congress on July 30, 2007, urging the Japanese Government to accept historical responsibility for these crimes.

It is our sincere hope that these unconscionable violations of human rights shall never recur.

July 30, 2013."

3. The Public Monument is located on public land in a publicly owned park in Glendale known as Central Park, located at 201 South Colorado St., Glendale, CA 91205. The Public Monument is in a prominent location directly in front of Glendale's Adult Recreation

Center within Central Park. Glendale sometimes refers to this area as "Adult Recreation Center/Central Park Complex" ("Complex"). The Complex offers a number of public benefits not offered elsewhere, including "senior programs and services that include health screenings and wellness programs, housing and legal assistance, life-long learning classes, travel and volunteer opportunities, recreational activities, and special events with an emphasis on diversity."[1] The Complex offers reduced-price senior meals seven days a week. It also offers all residents an exercise room fitness classes and facilities, at reduced rates for seniors, and it may be reserved for private events. Plaintiffs (including the constituent members of GAHT-US) could benefit from these programs and services but the Public Monument deters and interferes with Japanese-American citizens' use of the Complex and enjoyment of public benefits and facilities, and therefore Glendale has injured the Plaintiffs. Plaintiffs have no adequate remedy at law to address the foregoing conrete injuries.

4. Allowing the Public Monument to remain in place in Glendale's Central Park threatens irreparable injury to Gingery, Mera, Naoki, and GAHT-US, and its members. Glendale has deprived Plaintiffs and Japanese citizens equal protection of the laws and has offered certain privileges and immunities on different terms to Japanese-Americans, including Plaintiffs, by its placing the "Comfort Women" statue and plaque, which condemns Japan and the Japanese people, in such a manner to deprive

---

[1] http://www.glendaleca.gov/government/departments/community-services-parks/parks-facilities-historic-sites/adult-recreation-center-

the Plaintiffs of certain public benefits and use of property on equal terms as non-Japanese.

5. Glendale has singled out its Japanese-American citizens and associated them with alleged war crimes, sexual slavery and "unconscionable violations of human rights" by their ancestors and relatives, suggesting that the Japanese are unrepentant criminals. As a result of its decision to single out the nation of Japan and the Japanese people, Glendale has caused injury to the Plaintiffs by unfairly and one-sidedly implicating them as complicit with war crimes and "unconscionable violations of human rights," resulting in alienation and exclusion from Glendale's civic matters based on their national origin. Plaintiffs deplore the Public Monument's implication that they are associated with the war crimes alleged against their ancestors and, despite wanting to use the Complex and Central Park, avoid visiting the area because of the Public Monument. As longtime residents of Glendale, Gingery and Naoki have effectively been denied full enjoyment and the public benefits of Glendale's Central Park and feel threatened and unwelcome at the Adult Recreation Center.

6. On information and belief, Glendale has no public monument dedicated to public condemnation of alleged war crimes or human rights violations by any other nation, race or people at the Complex, in Central Park, or anywhere else within its city limits. Glendale has no public memorial to the wartime suffering and patriotism of its own Japanese-American citizens.

7. The subject of "Comfort Women" is intensely debated in and among many nations in Asia, particularly in Japan and South Korea. To this day, it

is a subject of diplomatic discussions at the highest levels of government of each nation. Officials of the Japanese government assert that the Japanese military and government were not responsible for or directly involved in the forceful recruitment of Comfort Women. Other governments, including that of South Korea, claim that Comfort Women were recruited by and/or forced into sexual slavery by the Japanese government and/or officials of the Japanese military. There have been ongoing international efforts to finally resolve the "Comfort Women" issue, and it has been the addressed in at least three (3) international treaties or settlements between foreign nations. nonetheless, several governments have continued to demand that Japan take additional steps to redress grievances.

8. During Glendale's Special Meeting, numerous individuals, including Japanese-Americans, among them Plaintiff Mera and members of GAHT-US, publicly opposed and condemned the proposed installation of the Public Monument, arguing that the Comfort Women issue is a matter of current diplomatic communications between South Korea and Japan, that the view advanced by the South Korean government on Comfort Women has been severely disputed, and that this controversy has become an element of U.S. foreign relations toward both Asian countries.

9. There has been significant international outcry following Glendale's installation of the Public Monument, specifically from Japanese officials. On July 24, 2013, Kuni Sato, the press secretary of the Japanese Ministry of Foreign Affairs, expressed Japan's official displeasure, remarking that installation of the Public Monument "does not coincide with

our understanding" of the Comfort Women dispute. On July 31, 2013, Kenichiro Sasae, Japanese Ambassador to the United States, declared that Glendale's action is "irreconcilable" with the position of the Government of Japan and is "highly regrettable." On August 13, 2013, Japanese Prime Minister Shinzo Abe stated that he was "extremely dissatisfied" with the installation of the Public Monument.

10. The Comfort Women issue is not merely an element of relations between Japan and South Korea, but an element of the United States' foreign relations with Japan and South Korea. On April 25, 2014, while visiting Seoul, South Korea, President Obama addressed the issue, expressed a portion of the United States' foreign policy view, and declared that the issue will require the "coordinated effort of our three countries." During a press briefing on January 7, 2013, White House Spokesperson Victoria Nuland reported that the Administration "continue[s] to hope that the countries in the region can work together to resolve their concerns over historical issues in an amicable way and through dialogue. As you know, we have no closer ally than Japan. We want to see the new Japanese Government, the new South Korean Government, all of the countries in Northeast Asia working together and solving any outstanding issues, whether they are territorial, whether they're historic, through dialogue." Similar statements have been made by U.S. Secretary of State John Kerry, and Daniel Russel, U.S. Assistant Secretary of State for East Asian and Pacific Affairs.

PARTIES TO THE ACTION

11. Plaintiff Michiko Shiota Gingery ("Gingery") is a long-time resident of Glendale. Gingery lives in the vicinity of Central Park and the Public Monument. Gingery is a founding member of Glendale's Sister City Committee, as related to the City of Hihashiosaka (Japan), a committee created to develop and administer Glendale's Sister City Program. In this capacity, Gingery made significant contributions to Glendale's establishment of a Sister City relationship with the City of Higashiosaka (at the time called Hiraoka), Japan, Glendale's first sister city. Gingery was born in Japan, and is now a naturalized U.S. citizen. As a Glendale resident of Japanese heritage, Gingery believes the Public Monument presents an unfairly one-sided portrayal of the historical and political debate surrounding Comfort Women and presents the potential to disrupt the United States' strategic alliances with its closest East Asian allies, Japan and South Korea.

12. Gingery suffers feelings of exclusion, discomfort, and anger because of the position espoused by her city of residence through its display and endorsement of the Public Monument. Gingery would like to use and enjoy Glendale's Central Park and Adult Recreation Complex, but she now avoids doing so because she is offended by the Public Monument's pointed expression of disapproval of Japan and the Japanese people. In addition, the presence of the Public Monument diminishes Gingery's enjoyment of the Complex. Gingery contributes as a taxpayer to the Adult Recreation Center/Central Park Complex, and the services offered there. Gingery, a senior citizen over the age of 60, could benefit from a variety of

public services and benefits at reduced prices available to senior citizens who reside in Glendale at the Complex. However, because of the presence of the Public Monument directly adjacent to the Adult Recreation Center, Gingery feels threatened and unwelcome as a person of Japanese origin and descent. Because the Public Monument states that her nation of origin should "take historical responsibility" for "unconscionable violations of human rights," while there is a vigorous, ongoing debate in the nations of Japan, South Korea and the United States, and elsewhere, pertaining to the historical issue of "Comfort Women," Gingery is intimidated and feels unwelcome at the Complex for reasons beyond her control.

13. Plaintiff GAHT-US Corporation ("GAHT-US") is a non-profit public benefit corporation organized under the laws of the State of California with a membership of nearly 500 people. The purpose of GAHT-US is to provide accurate and fact-based educational resources to the public in the U.S., including within California and Glendale, concerning the history of World War II and related events, with an emphasis on Japan's role. GAHT-US has undertaken this goal in an effort to enhance a mutual historical and cultural understanding between and among the Japanese and American people. Given its mission, GAHT-US believes that the Public Monument advances an unfairly biased portrayal of the Japanese government's purported involvement with Comfort Women during the World War II. Individual members of GAHT-US reside in Glendale and nearby cities, and elsewhere. GAHT-US's members suffer feelings of exclusion, discomfort, humiliation and anger by the continued presence of

the Public Monument, and the controversial and disputed stance on the debate surrounding Comfort Women that it perpetuates. Although GAHT-US members would like to visit and use Glendale's Central Park and its Adult Recreation Center, they no longer intend to do so as a result of their distress due to the Public Monument. In addition, the presence of the Public Monument diminishes GAHT-US members' enjoyment of the Adult Recreation Center/Central Park Complex.

14. Plaintiff Koichi Mera ("Mera") is a Japanese-American resident of the City of Los Angeles and the President of GAHT-US. Mera disagrees with and is highly offended by the position espoused by Glendale through the Public Monument and its pointed condemnation of the Japanese people and government. Although Mera would like to use Glendale's Central Park and its Adult Recreation Center, as a result of his alienation due to the Public Monument, he avoids doing so. In addition, the presence of the Public Monument diminishes Mera's enjoyment of the Complex.

15. Plaintiff Masatoshi Naoki ("Naoki") is a Japanese-American resident of the City of Glendale. Naoki disagrees with and is highly offended by the position espoused by Glendale through the Public Monument and its pointed condemnation of the Japanese people and government. Although Naoki would like to visit and use Glendale's Central Park and its Adult Recreation Center, as a result of his alienation due to the Public Monument, he avoids doing so. In addition, the presence of the Public Monument diminishes Naoki's enjoyment of the Adult Recreation Center/Central Park Complex. He also

deplores the Public Monument's implication that he is associated with the alleged war crimes of his ancestors.

16. Naoki contributes as a taxpayer to the Complex, and the services offered there. Naoki, a senior citizen over the age of 60, could benefit from a variety of public services and benefits available to citizens of Glendale at the Adult Recreation Center. However, because of the presence of the Public Monument directly adjacent to the Adult Recreation Center, Naoki feels unwelcome as a person of Japanese origin and descent. Because the Public Monument states that his nation of origin should "take historical responsibility" for "unconscionable violations of human rights," while there is a vigorous, ongoing debate in the nations of Japan, South Korea and the United States, and elsewhere, pertaining to the historical issue of "Comfort Women," Naoki feels threatened and unwelcome at the Adult Recreation Center for reasons beyond his control.

17. Defendant, the City of Glendale, is a political subdivision of the State of California operating under a charter authorized by the State of California that empowers it to pass ordinances and to govern and administer municipal activities within Glendale's city limits, with authority to be sued in its own name. Glendale's governing authority consists of city council, composed of five city council members (the "City Council"), one of whom also serves as the mayor. The City Council makes policy decisions for Glendale, including decisions regarding the use of public lands, and the offering of benefits and services to city residents such as Gingery and Naoki and visitors such as Mera and members of GAHT-US.

18. Plaintiffs are ignorant of the true names and capacities of Defendants sued herein as DOES 1 through 20, and therefore sues Defendants by such fictitious names. Plaintiffs will amend this Complaint to allege their true names and capacities when ascertained. Plaintiffs are informed and believe, and, based on such information and belief, allege each of the fictitiously named Defendants is responsible in some manner for the injuries to Plaintiffs as alleged herein. Plaintiffs further allege that their irreparable injuries were proximately caused by such defendants, and each of them.

PLAINTIFFS' STANDING TO OBTAIN RELIEF

19. Because the Public Monument contains and consists of a public condemnation of Japan and the Japanese people, and because it is placed on public property adjacent to Glendale's Adult Recreation Center, it has a chilling effect on citizens of Glendale and persons of Japanese origin and descent, alienates and excludes persons of Japanese origin, and inflicts emotional harm by associating them with alleged war crimes, "sexual slavery" and "unconscionable violations of human rights." Plaintiffs are informed and believe the Public Monument has also revived anti-Japanese sentiment within Glendale. Plaintiffs are informed and believe there have been reports in recent years that school children of Japanese families in Glendale and its vicinity have been alienated, bullied, marginalized, and insulted as a result of Glendale's treatment of its Japanese-American citizens.

20. Glendale has singled out its Japanese-American citizens. Plaintiffs deplore the Public

Monument's implication that they are associated with the war crimes or human rights violations and, despite wanting to use the Complex and Central Park, avoid visiting the area because of the Public Monument. As longtime residents of Glendale, Gingery and Naoki have effectively been denied full enjoyment and the public benefits of Glendale's Central Park and feel threatened and unwelcome at the Adult Recreation Center.

21. By singling out its Japanese-American citizens, Glendale has deprived Plaintiffs of equal protection of the laws and has offered certain privileges and immunities on different terms to Plaintiffs and other Japanese-Americans by placing the "Comfort Women" statue in a location that deprives Plaintiffs of the use of Central Park and the Complex on equal terms as non-Japanese. The presence of the Public Monument has directly harmed Plaintiffs by preventing and deterring their use and enjoyment of the Complex and Central Park in contrast to other, non-Japanese individuals.

22. Despite plans to use the Complex and Central Park, Plaintiffs have intentionally avoided visiting the area since the installation of the Public Monument. Plaintiffs are offended by the anti-Japanese message of the Public Monument and would be confronted with this message if they attempted to make use of the Complex's facilities or gain access to Central Park. As longtime residents of Glendale, Gingery and Naoki have effectively been denied full enjoyment of Central Park's benefits as Glendale has turned visiting the Park into a highly offensive locale and political hotbed. As senior citizens, they are also deprived of the benefits and discounts provided to seniors at the

Complex. The presence of the Public Monument has had a similar negative impact on GAHT-US's members, including Mera, who avoids using and benefitting from Glendale's Central Park.

23. If not for the Public Monument, Plaintiffs would make use of the Complex and Central Park. Their disagreement with and humiliation from the highly offensive statements on the Public Monument interfere with Plaintiffs' use of Central Park and the Complex, and they have suffered a loss of recreational enjoyment as a result of the Public Monument. Plaintiffs are faced with the choice of not using Central Park or the Complex, or being forced to confront the Public Monument's explicitly anti-Japanese message in order to use these public facilities. This, in combination with the facts alleged above, confers standing on Plaintiffs. *See Barnes-Wallace v. City of San Diego* (9th Cir. 2008) 530 F.3d 776.

JURISDICTION

24. This action arises under Article 1, Section 7(a) and Article 1, Section 7(b) of the California Constitution. This action also arises under *inter alia*, 42 U.S.C. § 1983; the foreign affairs powers of the United States, U.S. Cons. art. II, sec. 1, cl. 1; sec. 2, cl. 1; sec. 2, cl. 2; and sec. 3; and the Supremacy Clause, U.S. Constitution, art. VI, cl. 2. In the absence of a statutory directive or clear legislative history, state courts have jurisdiction over issues of federal law concurrent with federal courts. *Brown v. Pitchess* (1975) 13 Cal.3d 518, 523; *Gulf Offshore Co. v. Mobil Oil Corp.* (1981) 453 U.S. 473, 478. This court has jurisdiction over all parties as they are residents of or doing business in Los Angeles County.

FIRST CLAIM FOR RELIEF
(Against All Defendants)
(Unconstitutional Interference With Foreign Affairs Power)

25. Plaintiffs repeat and incorporate the allegations in Paragraphs 1 through 24 of this Second Amended Complaint as though fully set forth herein.

26. Power over foreign affairs is expressly reserved to the federal government of the United States. *Movsesian v. Victoria Versicherung AG* (9th Cir. 2012) 670 F.3d 1067, 1072 *cert. denied*, (U.S. 2013) 133 S.Ct. 2795. States are not free to pursue their own foreign policies even in in the absence of a relevant federal policy. *Id.* Glendale's actions attempt to establish foreign policy and disturb foreign relations on a highly politicized issue of global politics. Glendale's actions intrude on the federal government's exclusive power to conduct and regulate foreign affairs.

27. Foreign affairs field preemption occurs when a state attempts to establish its own foreign policy, regardless of whether there is a statute or treaty expressing a federal policy, and regardless of the message of that policy. *Movsesian*, 670 F.3d at 1075; *Von Saher v. Norton Simon Museum of Art at Pasadena* (9th Cir. 2010) 592 F.3d 954, 964; *Deutsch v. Turner Corp.* (9th Cir. 2003) 324 F.3d 692, 714. Even if a state's action purports to regulate an area of traditional state competence, a state may not take action that affects issues of foreign policy outside of its typical and quintessential state functions. *Movsesian*, 670 F.3d at 1075; *Von Saher*, 592 F.3d at 964.

28. Glendale's action takes a position on matters of foreign policy with no claim to be addressing a

traditional state responsibility. Glendale is a small municipal government with local concerns. The historical and political implications of the international debate over "Comfort Women," including the actions or omissions of Japan as a foreign government, are not a traditional state responsibility that Glendale may properly regulate. The actions of Glendale in approving and installing the Public Monument are beyond its authority in violation of the U.S. Constitution's foreign affairs power and the Supremacy Clause. *Movsesian*, 670 F.3d at 1075.

29. Glendale has impermissibly intruded upon and interfered with foreign relations with Japan and has taken a side in an international debate over foreign affairs. The text of the plaque on the Public Monument constitutes a transaction of foreign policy given that it takes a one-sided position on a hotly contested international issue, criticizes the actions of a foreign government and a United States ally, and is a direct solicitation to a foreign government to take action, among other things. In fact, Glendale Mayor Dave Weaver, who voted against installation of the Public Monument, later explained in a letter to Yoshikazu Noda, Mayor of Higashiosaka, Japan that the dispute over Comfort Women "is an international one between Japan and South Korea and the City of Glendale should not be involved on either side."

30. Glendale's Public Monument is intended to send a political message on a distinct point of view regarding a matter of foreign policy. It attempts to condemn and force the Japanese government to make additional reparations and to provide a friendly forum for foreign victims. This effect on foreign affairs is not incidental. *Movsesian*, 670 F.3d at 107.

31. State and federal governments do not have license to promulgate or communicate offensive or partisan messages. Glendale's actions are in conflict with Constitutional law and are not protected by free speech principles. *Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460, 481 (Stevens, J., concurring).

SECOND CLAIM FOR RELIEF
(Against All Defendants)
(Violation of the Glendale Municipal Code)

32. Plaintiffs repeat and incorporate the allegations in Paragraphs 1 through 31 of the Second Amended Complaint as though fully set forth herein.

33. Glendale Municipal Code Section 2.04.140 provides: "In all matters and things not otherwise provided for in this chapter, the proceedings of the council shall be governed under Robert's Rules of Order, revised copy, 1952 edition." Pursuant to Robert's Rules of Order, to introduce a new piece of business or propose a decision or action, a motion must be made by a group member. (Art. 1, Sec. 4.) A second motion must then also be made. (Art. I, Sec. 5.) And after limited discussion, the group then votes on the motion. (Art. I, Sec. 7 & 9.) A majority vote is required for the motion to pass. (*Id.*)

34. The Public Monument was not properly approved by the City Council pursuant to Glendale Municipal Code Section 2.04.140. An integral part of the Public Monument—the plaque that specifically attributes responsibility for, inter alia, "snatching [women] from their homes" and "coerc[ing them] into sexual slavery" to Japan—was neither proposed to the City Council nor made the subject of a motion to the

City Council, and was not approved by it as required. The report recommending approval of the installation of the Public Monument, submitted to the City Council in conjunction with the motion, included a schematic diagram depicting the proposed statue and its location. The diagram, however, did not include any mention of, or reference to, the text of the plaque that currently is part of the Public Monument. The proposed language presented to the Council never mentioned Japan at all, and the City Council was specifically advised that the inscription on the plaque would be different than the inscription ultimately used. Thus, the City Council never voted to approve the text on the plaque.

35. Notwithstanding the numerous objections voiced at the Special Meeting, ignorance over the text that would be included, and Glendale's failure to consult its Sister Cities committee, or any of Glendale's non-Korean Sister Cities, the City Council approved the installation of the "Korean Sister City 'Comfort Women' Peace Monument" "as shown and described in the Report to Council dated July 9, 2013" by a vote of 4 to 1.

36. As a result, the installation of the Public Monument violated the Glendale Municipal Code and has cause irreparable harm to Plaintiffs.

THIRD CLAIM FOR RELIEF
(Against All Defendants)
(Violation of the Equal Protection Clause of the California Constitution)

37. Plaintiffs repeat and incorporate the allegations in Paragraphs 1 through 36 of the Second Amended Complaint as though fully set forth herein.

38. Article 1, Section 7(a) of the California Constitution ("Equal Protection Clause") states, in pertinent part: "A person may not be . . . denied equal protection of the laws . . . "

39. Plaintiffs seek a judicial declaration that the Public Monument's placement in the so-called Sister City area of Glendale's Central Park, adjacent to the Adult Recreation Center, denies them equal protection of the laws, and thus violates the Equal Protection Clause, because: (a) the Public Monument expressly and impliedly disapproves of individuals of Japanese origin and descent by wrongly accusing the Japanese nation of "coercing" women into sexual slavery (a matter of international debate), and publically "celebrating" a bill that demands that the Japanese nation "take historical responsibility" for actions which the Japanese, including Plaintiffs, believe the government is falsely accused of, thereby adopting an anti-Japanese stance, while ignoring the wartime suffering and patriotism of Japanese-Americans, resulting in alienation of Glendale's Japanese-American population; (b) to the extent the Public Monument honors Glendale's Korean sister city, no public monument exists in the Sister City area of Central Park that honors any of Glendale's sister cities in Japan, Mexico, and Armenia and none of the other sister cities were consulted by Glendale prior to its decision to erect the Public Monument; and (c) the Public Monument interferes with the Plaintiffs' use and enjoyment of Glendale's Central Park and Glendale's Adult Recreation Center, and (d) the Public Monument discourages Plaintiffs Gingery, Mera and Naoki from equal and unfettered access to public

services and benefits that are offered only at the Adult Recreation Center.

FOURTH CLAIM FOR RELIEF
(Against All Defendants)
(Violation of the Privileges and Immunities Clause of the California Constitution)

40. Plaintiffs repeat and incorporate the allegations in Paragraphs 1 through 39 of the Second Amended Complaint as though fully set forth herein.

41. Article 1, Section 7(b) of the California Con–stitution ("Privileges and Immunities Clause"), states: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." Plaintiffs seek a judicial declaration that the Public Monument's placement in the so-called Sister City area of Glendale's Central Park, adjacent to the Adult Recreation Center, denies them, as Japanese-American citizens, privileges and immunities on the same terms as non-Japanese citizens, and violates the Privileges and Immunities Clause, because: (a) the Public Monument expressly and impliedly expresses disapproval of individuals of Japanese origin and descent by publically demanding that the Japanese nation "take historical responsibility . . . for unconscionable violations of human rights . . . ", thereby adopting an anti-Japanese stance, while ignoring the wartime suffering and patriotism of Japanese-Americans, resulting in alienation of Glendale's Japanese-American population; (b) to the extent the Public Monument honors Glendale's Korean sister city, no public monument exists in the Sister City area of Central Park that honors any of Glendale's sister cities in Japan, Mexico, and Armenia

and none of the other sister cities were consulted by Glendale prior to its decision to erect the Public Monument; (c) the Public Monument interferes with the Plaintiffs' use and enjoyment of Glendale's Central Park and Glendale's Adult Recreation Center, and (d) the Public Monument discourages Plaintiffs Gingery, Mera and Naoki from equal and unfettered access to public services and benefits that are offered only at the Adult Recreation Center.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

1. That the Court declare Glendale's installation of the Public Monument unconstitutional and null and void;

2. That the Court preliminarily and permanently enjoin and compel Defendants, and each of them, to remove the Public Monument from public property in Glendale, including but not limited to, any area in or adjacent to Central Park; or in the alterative, remove the Public Monument's offensive plaque ridiculing and condemning the Japanese government;

3. That the Court award Plaintiffs their costs and attorneys' fees pursuant to California Code of Civil Procedure § 1021.5; and

4. For such other and further relief as the Court deems just and proper.

DeClercq Law Group

By: _____

William B. DeClercq
Attorney for Plaintiffs
Michiko Shiota Gingery,
Koichi Mera, and GAHT-
US Corporation and
Masatoshi Naoki

Dated: February 20, 2014

PETITION FOR REHEARING EN BANC (SEPTEMBER 16, 2016)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHIKO SHIOTA GINGERY, KOICHI MERA, and GAHT-US CORPORATION,

Plaintiffs-Appellants,

v.

CITY OF GLENDALE, a Municipal Corporation,

Defendant-Appellee.

No. 14-56440

On Appeal from an order of the United States District Court for the Central District of California Case No. 2:14-cv-1291. The Honorable Percy Anderson, United States District Judge

Maxwell M. Blecher
Donald R. Pepperman
Taylor C. Wagniere
Blecher Collins Pepperman & Joye
515 South Figueroa Street,
Suite 1750
Los Angeles, CA 90071-3334
Telephone: (213) 622-4222
Attorneys for Plaintiffs-Appellants

Ronald S. Barak
Law Offices of
Ronald S. Barak
206 Giardino Way
Pacific Palisades, CA 90272
Telephone: (310) 459-3963
Attorneys for Plaintiffs-Appellants

I. Introduction and FRAP 35(b) Statement

This petition presents an issue of extraordinary national, international, and doctrinal importance left open by this Court's en banc opinion in *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 & n.5 (9th Cir. 2012): Is local government expressive conduct that intrudes on the federal government's exclusive foreign affairs power subject to field preemption? In 2012, this Court en banc stated: "We need not and do not offer any opinion about California's ability to express" a particular viewpoint on a matter of foreign affairs by, "for example, declaring a commemorative day." *Id.* at 1077 n.5. The panel here held that the Supremacy Clause does not preempt local government expression on foreign affairs, even when it advocates a distinct viewpoint on a contested matter of foreign affairs and urges a foreign sovereign to accept historical responsibility for alleged international human rights violations.

The panel's holding is inconsistent with Supreme Court precedent and this Court's foreign affairs preemption cases. *See, e.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421-25 (2003); *Zschernig v. Miller*, 389 U.S. 429, 436-38 (1968); *Movsesian*, 670 F.3d at 1077; *Van Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 964-68 (9th Cir. 2010); *Deutsch v. Turner Corp.*, 324 F.3d 692, 708-16 (9th Cir. 2003). If permitted to stand, the panel's decision will upset the Constitution's allocation of the foreign affairs power.

This suit challenges as unconstitutional Glendale's installation and maintenance of an 1,100 pound statue and plaque (collectively, "monument") that castigates the Japanese for their World War II activities regarding Comfort Women, finds the Japanese

guilty of alleged international human rights violations, and "urg[es] the Japanese Government to accept historical responsibility for [its alleged] crimes." (Dkt. 19-3, Excepts of Record ("ER") 57-58, ¶11.) The panel (Circuit Judges Stephen Reinhardt and Kim McLane Wardlaw, and Edward R. Korman, Senior District Judge, sitting by designation) rejected arguments based on *Garamendi* and *Zschernig* and this Court's decisions in *Movsesian*, *Van Saher*, and *Deutsch* that Glendale's installation of the monument is preempted by the federal government's exclusive foreign affairs power.

The panel's holding is incorrect as a matter of law and fact and constitutes a danger to U.S. interests. It cannot be reconciled with decisions of the Supreme Court and this Court. The panel's validation of Glendale's action is inconsistent with the constitutional structure. En banc review is imperative.

II. Factual Background

1. In July 2013, although Glendale's then-mayor recognized that the historical dispute over World War II Comfort Women "is an international one between Japan and South Korea and the City of Glendale should not be involved on either side" (ER 62, ¶32), Glendale installed in its Central Park a statue of a young girl in Korean dress sitting next to an empty chair with a bird perched on her shoulder (ER 57-58, ¶11). Prominently affixed to the statue is a permanent plaque that reads:

"I was a sex slave of the Japanese Military."

> "Torn hair symbolizes the girl being snatched from her home by the Imperial Japanese Army."
>
> "In memory of 200,000 Asian and Dutch women who were removed from their homes in Korea, China, Taiwan, Japan, the Philippines, Thailand, Vietnam, Malaysia, East Timor and Indonesia, to be coerced into sexual slavery by the Imperial Armed Forces of Japan between 1932 and 1945."
>
> "And in Celebration of proclamation of 'Comfort Women Day' by the City of Glendale on July 30, 2012 and of the passing of House Resolution 121 by the United States Congress on July 30, 2007, urging the Japanese Government to accept historical responsibility for these crimes."
>
> "It is our sincere hope that these unconscionable violations of human rights shall never recur." (*Id.*)

The monument was promoted and donated by a Korean-American advocacy group. (Dkt. 42, Brief Of Amicus Curiae The Korean American Forum Of California, 1.)

This language relates to alleged World War II forced recruitment of women to serve as sexual partners to Japanese troops. (ER 58-59, ¶14.)

The debate concerning these women continues to date and has been a source of substantial tension between Japan and South Korea in recent decades. (ER 59, ¶18.) Japan denies responsibility for Comfort Women recruitment and asserts that all World War

II-related claims, including those related to Comfort Women, were resolved by postwar treaties. (ER 60, ¶¶21-23.) South Korea, however, contends that the Comfort Women issue remains unresolved and unredressed. (ER 59, ¶20).

2. During this appeal, Japan and South Korea entered into a binding international agreement on December 28, 2015 that seeks to "final[ly] and irreversib[ly]" resolve the Comfort Women issue after 70 years of intractable debate.[1] During the negotiations, Japan insisted that South Korea remove a monument in Seoul almost identical to the one in Glendale's Central Park.[2] The Seoul monument is one of the chief hurdles to full implementation of the agreement.[3]

The United States has praised and supports this agreement and "call[s] on the international community to support it."[4] James K. Glassman, former U.S. Undersecretary of State, recently opined that "the

---

1 *Japan and South Korea Agree To WW2 'Comfort Women' Deal*, BBC NEWS, Dec. 28, 2015, http://www.bbc.com/news/world-asia-35188135.

2 Ju-min Park, *A monument of a 'comfort woman' is testing a landmark agreement between Japan and South Korea*, REUTERS, Dec. 28, 2015, http://www.businessinsider.com/comfort-woman-statue-testing-landmark-agreement-between-japan-south-korea-2015-12.

3 Prakash Panneerselvam and Sandhya Puthanveedu, *6 Months Later*: *The 'Comfort Women' Agreement*, THE DIPLOMAT, May 11, 2016, http://thediplomat.com/2016/05/6-months-later-the-comfort-women-agreement/.

4 Press Statement by John Kerry, *Resolution of the Comfort Women Issue*, U.S. DEPARTMENT OF STATE, Dec. 28, 2015, http://www.state.gov/secretary/remarks/2015/12/250874.htm.

United States played a key role in helping South Korea and Japan forge an agreement" to improve economic and security relations in Asia.[5] In response to the agreement, continues Undersecretary Glassman, North Korea and China "have been deploying a strategy of undermining cooperation;" the goal of which is to use the Comfort Women issue to drive South Korea and Japan apart.[6] The Comfort Women issue is thus one of strategic importance for U.S. policy in Asia.

3. Besides supporting the agreement, the federal government has sought to "avoid taking sides" in this contentious historical debate. (ER 64, ¶43.) In the last two years, White House Spokesperson Victoria Nuland, Secretary of State John Kerry, and Daniel Russel, the U.S. Assistant Secretary of State for East Asian and Pacific Affairs, have all stated that the Comfort Women issue is one between Japan and South Korea, and that the United States is hopeful that the nations will work together to resolve their differences through government-to-government negotiations. (ER 64-65, ¶¶46-48.)[7]

---

[5] James K. Glassman, *North Korea, China Want to Undo the Japan-South Korea Alliance That the U.S. Helped Broker*, FOXNEWS, Aug. 8, 2016, http://www.foxnews.com/opinion/2016/08/08/north-korea-china-want-to-undo-japan-south-korea-alliance-that-us-helped-broker.html.

[6] *Id.*

[7] A key part of the panel's analysis was that "the federal government has [not] expressed any view on the monument." *Gingery*, 2016 WL 4137637, at *8. Yet, the panel never requested the views of the United States.

4. Glendale's monument has provoked significant backlash. Japanese officials at all levels of government have publicly expressed disapproval. (ER 63-64, ¶¶37-42.) In late July 2013, the press secretary of the Japanese Ministry of Foreign Affairs commented that the monument "does not coincide with our [Japan's] understanding" of the Comfort Women dispute. (ER 63, ¶37.) Over the next week, at least three other Japanese officials expressed disappointment with Glendale's actions. (ER 63-64, ¶¶39-42.) In August 2014, Japanese Prime Minister Shinzo Abe stated that he was "extremely dissatisfied" with the installation of the monument. (ER 63, ¶41.)

5. Plaintiffs sued Glendale, arguing, inter alia, that the monument interferes with the federal government's foreign affairs power and violates the Supremacy Clause. Without hearing, the district court, Judge Percy Anderson, dismissed Plaintiffs' case with prejudice. The district court first determined that Plaintiffs lacked standing, and, in the alternative, held that Plaintiffs failed to state a claim. The district court also declined to exercise supplemental jurisdiction over a state law claim, dismissing it without prejudice. Plaintiffs were not, however, permitted to amend their complaint even a single time. (ER 23-26.)

6. On appeal, the panel affirmed. First, after finding Article III standing because of Plaintiffs' "inability to unreservedly use" Glendale's Central Park, *Gingery*, 2016 WL 4137637, at *2-4, it held that Plaintiffs Koichi Mera and GAHT-US Corporation[8] failed to state a claim for foreign affairs preemption

---

8 Plaintiff Michiko Gingery's claim was rendered moot by her death.

and that the district court did not abuse its discretion in denying leave to amend, *id.* at *4-6, *8. The panel framed the constitutional issue as follows: "whether the Supremacy Clause preempts a local government's expression, through a public monument, of a particular viewpoint on a matter related to foreign affairs." *Id.* at *5. Relying on *Movsesian* and *Von Saher*, the panel held that Glendale's monument "is well within the traditional responsibilities of state and local governments," *id.*, and that Glendale's actions have not intruded on the federal government's foreign affairs powers, *id.* at *6.

Confirming the doctrinal importance of this case, Judge Korman filed a concurring opinion that concluded that Plaintiffs lack a constitutional, statutory, or equitable cause of action because a local government's expressive, nonregulatory conduct is not "within the category of cases [that provide a] cause of action . . . to restrain conduct that touches on the power of the President or Congress in the area of foreign affairs." *Id.* at *7-9.

III. The Petition Should Be Granted

A. Glendale's Installation of the Monument Is Preempted by the Federal Government's Foreign Affairs Power

1. Glendale's actions are preempted because they overstep state and local authority by "intru[ding] . . . the State into the field of foreign affairs." *Garamendi*, 539 U.S. at 417 (quoting *Zschernig*,

389 U.S. at 432).[9] As this Court held in *Movsesian*, "even when the federal government has taken no action on a particular foreign policy issue, the state [or a municipality, such as Glendale,] generally is not free to make its own foreign policy on that subject." 670 F.3d at 1072; *see also Japan Line, Ltd. v. Los Angeles Cnty.*, 441 U.S. 434, 455 (1979) ("California may not tell the Nation or Japan how to run their foreign policies."). As the Supreme Court observed in *Garamendi*, "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," then field preemption is applicable. 539 U.S. at 419-20 n.11. Indeed, foreign affairs preemption is most appropriate "when state action reflects a state policy critical of foreign governments and involves 'sitting in judgment' on them." *Id.* at 439 (Ginsburg, J., joined by Stevens, Scalia, and Thomas, JJ., dissenting) (citation, brackets and quotations omitted and emphasis added).

Yet that is just what Glendale did in installing the monument at issue. Glendale took a foreign affairs position that Japan is guilty of international human rights violations. Glendale not only seeks to establish a foreign policy, but also advocates that Japan, an important ally of the United States, "accept historical responsibility for these crimes." (ER 57-58, ¶11.) Glendale's conduct is preempted because it is more than "merely expressive" or "commemorative," *Movsesian*, 670 F.3d at 1077 & n.5; it advocates (through coercion and interference) that Japan take actions

---

[9] Municipalities and states are subject to the same rules of preemption. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

that the federal government has never urged.[10] It thus intrudes upon the federal government's exclusive authority to regulate foreign affairs.

It is true that, for field preemption to apply, the challenged action must have "more than some incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 434 (quotations and citations omitted); *Movsesian*, 670 F.3d at 1072. But there can be no doubt that Glendale's conduct had such an effect. Reactions from the highest ranks of the Japanese government—including the Prime Minister, the Chief Cabinet Secretary, and Japan's Ambassador to the United States—are detailed in Plaintiffs' complaint. (ER 63-64, ¶¶36-42.)

2. In rejecting field preemption, the panel's first response was that "Glendale's establishment of a public monument to advocate against 'violations of human rights' is well within the traditional responsibilities of state and local governments." 2016 WL 4137637, at *5. But the panel's description of the facts and its legal conclusions are erroneous.

The panel recognized, but ignored, the basic rule that on a motion to dismiss for failure to state a claim the court must accept all of the facts alleged in the complaint as true and must construe them in the light most favorable to the plaintiff. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). The panel incorrectly characterized the monument as merely "commemorating the 'Comfort Women,'" *id.* at

---

[10] Glendale's reference in the plaque's language to a non-operative resolution of the House of Representatives does not prove that its actions are in accord with federal policy. Indeed, such a resolution cannot establish U.S. foreign policy.

*1, and "advocat[ing] against 'violations of human rights,'" *id.* at *5. The panel compounded this error by misstating the purpose of the plaque as merely "memorializing victims and expressing hope that others do not suffer a similar fate." *Id.* at *6. In using the words "similar fate," the panel is referring to criminal sexual enslavement. This shows the panel admits what it denies as being the true focus of the monument. In essence, the panel selectively focused on the plaque's language directed only at the Comfort Women, omitting virtually every plaque provision critical of the Japanese. (ER 57-58.)

The panel's selective reading of the facts disregarded Plaintiffs' well-pleaded, factual allegations that the monument seeks to establish foreign policy by taking sides, casting blame on Japan, and pressuring Japan to "accept historical responsibility for these crimes." (ER 57-58, ¶11.) The panel completely ignored in its analysis that the monument "urg[es] the Japanese Government to accept historical responsibility for [the comfort women] crimes." (*Id.*)

When the facts are viewed in the light most favorable to the Plaintiffs, it is clear that Glendale's monument does not merely commemorate Comfort Women and advocate against violations of human rights generally; it criticizes and sits in judgment of Japan. Glendale is not merely expressing an opinion on some uncontested historical event, but takes a charged political position on a contested matter of foreign affairs by urging Japan to accept responsibility for alleged violations of international human rights law. Calling one of the United States' closest allies to account for war crimes is not a traditional local or state responsibility and cannot "be fairly categorized

as a garden variety" commemorative memorial. *Von Saher*, 592 F.3d at 964. Nor is it a traditional local interest for Glendale to involve itself in a debate that implicates not just Japan and South Korea, but China and North Korea also.[11]

Even if the panel is correct that a local government may engage in expressive conduct related to foreign affairs that merely memorializes and commemorates (not the case here), a local government may not urge and advocate that a foreign nation take a course on a contested matter of foreign affairs. Just as Glendale cannot install a monument urging Israel to accept Jerusalem as the Capital of Palestine, *cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2094 (2015), it cannot urge Japan to accept historical responsibility for contested World War II acts.

Compounding this error, the panel also reached beyond the record and inappropriately relied on examples of other (oddly mostly foreign) governments installing memorials to buttress its legal conclusion that Glendale's activities are traditional responsibilities of U.S. state and local governments. 2016 WL 4137637, at *5. The panel's approach is improper because unsubstantiated websites not in the record should not be used to "establish legal principles" or determine "legislative facts." *See Von Saher*, 592 F.3d at 960 (quotations and citations omitted).

The panel's extra-record (Internet-based) research, 2016 WL 4137637, at *5 nn.5-8, exposes another problem with the panel conducting its own unnoticed investigation—the panel failed to give Plaintiffs the

---

11 Glassman, *supra* note 5.

opportunity to respond. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1267 (9th Cir. 2001). A response is critical here because the memorials cited do not support the panel's legal conclusion.

As to the 27 Holocaust memorials cited,[12] only 4 are in the United States. The 23 foreign memorials have nothing to do with traditional U.S. governmental interests. Each of the 4 domestic memorials is materially different than the monument here because they do not take a contested position on a matter of foreign affairs (the Holocaust is not subject to any serious scholarly debate) and do not urge or advocate that a foreign government accept historical responsibility for alleged crimes. Indeed, these memorials, unlike the Glendale monument, are commemorative works only and not works of advocacy. The Armenian genocide monument cited by the panel is dedicated to "victims of the Genocide perpetrated by the Turkish Government."[13] However, one cannot tell from the website whether this is part of a group of expressive displays or represents the views of the City of Montebello. Regardless, that monument does not urge the present-day government of Turkey to take any action or accept responsibility for crimes against humanity. The positions taken by local government officials on Apartheid and Boko Haram also are inapposite. 2016 WL 4137637, at *5 nn.7-8. The

---

12 *See Gingery,* 2016 WL 4137637, at *5 n.5 (citing *Holocaust Memorials*, Ctr. for Holocaust & Genocide Stud., Univ. of Minn., http://chgs.umn.edu/museum/memorials/).

13 *Id.* at *5 n.6 (citing *Monument at Bicknell Park in Montebello, California*, Armenian Nat'l Inst., http://www.armenian-genocide.org/Memorial.118/current_category.75/offset.20/memorials_detail.html).

fleeting statement of two mayors on uncontested foreign policy matters is a far cry from the permanent monument challenged here. *See Pleasant Grove v. Summum*, 555 U.S. 460, 479 (2009) (noting that permanent monuments are different than other government speech).

The panel's Internet research does not uncover any "long list of other American cities that have likewise used public monuments to express their views on events that occurred beyond our borders." 2016 WL 4137637, at *5. This was to be expected, as there is simply no long tradition of local governments demanding foreign allies to make amends for alleged historical wrongs, especially when the federal government has not taken such a position.

Furthermore, *Garamendi*, *Zschernig*, *Movsesian*, *Von Saher*, and *Deutsch*, all require courts to look to the "real purpose" of government action. The panel retreated from its mandated responsibility to look beyond the stated purposes of the monument. *See, e.g.*, *Movsesian*, 670 F.3d at 1076. The panel did not even consider all the Plaintiffs' evidence.[14]

The monument was donated by a Korean activist organization that opposes the recent negotiations between Japan and South Korea to resolve the comfort

---

[14] Here again, the panel did not view the facts in the light most favorable to the Plaintiffs. Instead, it discounted Plaintiffs' allegations and relied solely on "Glendale's stated purposes" to characterize the monument as "memorializing victims and expressing hope that others do not suffer a similar fate." *Gingery*, 2016 WL 4137637, at *6.

women issue.[15] Furthermore, Korean and Chinese organizations filed amicus briefs herein opposing Japan although previously rejected by the district court. It is beyond obvious that the real purpose of the monument is to attack Japan and not merely to commemorate comfort women.

Members of Glendale's City Council acknowledged the foreign affairs purpose of Glendale's actions on numerous occasions. At the July 30, 2013 City Council Meeting, City Council Member Laura Friedman commented: "We really put the city of Glendale on the international map today by doing this." (ER 62, ¶34.)

Lest there be any doubt what Glendale's "real purpose" in installing the monument was, Councilmember Zareh Sinanyan, a lawyer, made clear that Glendale intended to insert itself into foreign affairs notwithstanding his expressly acknowledged understanding that such action violated this Court's clear case law: "Another argument [is that] Glendale has no authority to be doing anything about this issue, it's a federal issue. Just last year, the Turkish government pushed a lawsuit . . . which they succeeded on in the Ninth Circuit making the exact same argument . . . saying that the recognition of the Armenian genocide by state authorities . . . was not proper [presumably referring to this Court's *Movsesian* case]." (Dkt. 19-1, Plaintiffs-Appellants' Opening Brief, at 10.)[16] According to him, this Court's en banc decision

---

[15] *See KAFC Statement on the Japan-S. Korea Deal*, KOREAN AMERICAN FORUM OF CALIFORNIA, Apr. 23, 2016, http://kaforumca.org/kafc-statement-on-the-japan-s-korea-deal/.

[16] The panel refused to take judicial notice of this evidence submitted by Plaintiffs, and other evidence properly before it. At

was not to be followed because the Comfort Women question is "a moral issue; it's a state issue." (Dkt. 37-1, Appellee's Answering Brief, at 36-37 n.14.) But, regardless of Glendale's moral conviction, this is not a state issue; this is an exclusively federal issue.

Because the panel ignored its responsibility to look to the "real purpose" of Glendale's actions, its opinion creates an irreconcilable conflict with decisions of the Supreme Court and this Court that necessitates en banc review.

3. In rejecting field preemption, the panel's second response was that "even if Glendale were acting outside an area of traditional state responsibility, Plaintiffs have not plausibly alleged that Glendale's actions intrude on the federal government's foreign affairs power." 2016 WL 4137637, at *6 (quotations and citation omitted). The panel concluded that Plaintiffs needed to allege, beyond the well-pleaded statements of disapproval of Japanese officials, that "this disapproval has . . . affected relations between the United States and Japan." *Id.* However, this Court's field preemption cases do not hold that a state or locality's prohibited intrusion into foreign affairs must be pled in this way. Rather, this Court's cases recognize a different principle—that

---

a minimum, leave to amend should have been granted. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1053 (9th Cir. 2003) (leave to amend should be granted when the plaintiff offers additional evidence in good faith). The panel did, however, accept amicus briefs that supported Glendale, even though admitted at the last moment without affording Plaintiffs any opportunity to respond and even though the district court had rejected the same briefs as irrelevant. Indeed, the panel could have granted leave to amend to establish these facts.

"more than some incidental or indirect effect on foreign affairs" can be shown when government action "expresses a distinct political point of view on a specific matter of foreign policy." *Movsesian*, 670 F.3d at 1076 (quotations and citation omitted). As in *Movsesian*, Glendale has "impose[d] the politically charged label," *id.*, that Japan has committed violations of human rights. And, as in *Movsesian*, Glendale has established "a particular foreign policy, . . . one that decries," *id.*, the actions of Japan and sits in judgment of that government.

Glendale's conduct impermissibly assigns Glendale a role in the formation of foreign policy that the Constitution does not permit. Its actions are thus preempted.

B. The Panel Impermissibly Narrowed *Movsesian* and has Effectively Announced the Rule That a State or Local Government's non-Regulatory, Expressive Conduct Is Not Subject to Foreign Affairs Preemption

The panel recognized that this Court sitting en banc has not expressed an opinion on whether a state or local government's commemorative expression on a matter of foreign affairs is subject to preemption. 2016 WL 4137637, at *5. The panel then explained that in addressing the issue presented, its holding was limited to "the circumstances of this case." *Id.* Later in the opinion, however, the panel included dangerous dicta that, if not corrected by this Court en banc, effectively announces the rule in this Circuit that non-regulatory, expressive conduct of state and local governments is not subject to foreign affairs preemption.

As the panel explained, "in contrast to state actions we have found preempted, Glendale has taken no action that would affect the legal rights and responsibilities of any individuals or foreign governments." *Id.* at *6 (citing to *Movsesian* and *Von Saher*).

The panel's dicta permits state and local governments to do an end run around *Movsesian* by labeling their conduct as expressive and nonregulatory, even though the real purpose of such conduct is to intrude on the federal government's exclusive foreign affairs power. Unless this Court wishes to endorse that position—providing local governments with a blueprint for evading judicial scrutiny for their intrusions into the federal government's exclusive domain—it must grant rehearing en banc.

En banc review is also warranted to resolve whether Judge Korman's concurring opinion, which would hold that individuals do not have a constitutional, statutory, or equitable cause of action to challenge expressive, non-regulatory government action as violative of the foreign affairs power, should be the law of this Circuit. In noting that Judge Korman's analysis "may very well be correct," *id.* at *9 n.9, the panel has signaled (both in this footnote and in the dicta discussed above) to courts in this Circuit that the question this en banc Court left open in *Movsesian* is no longer open. But that would be in conflict with cases of the Supreme Court and this Court discussed above where individuals clearly may state a foreign affairs preemption claim. This en banc Court should resolve this important question of doctrine.

IV. Conclusion

The Court should grant rehearing en banc.

Respectfully submitted,

The Law Offices of Ronald S. Barak

Blecher Collins Pepperman &
Joye, P.C.
Maxwell M. Blecher
Donald R. Pepperman
Taylor C. Wagniere

By: /s/ Ronald S. Barak
Attorneys for
Plaintiffs-Appellants

Dated: September 16, 2016

BRIEF OF AMICUS CURIAE THE NIPPON TODAY'S RESEARCHERS SOCIETY (KINGEN) IN SUPPORT OF PLAINTIFFS AND APPELLANTS PETITION FOR RECONSIDERATION EN BANC (SEPTEMBER 26, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHIKO SHIOTA GINGERY, an individual, KOICHI MERA, an individual, GAHT-US CORPORATION, a California non-profit corporation,

Plaintiffs and Appellants,

v.

CITY OF GLENDALE, a Municipal Corporation, SCOTT OCHOA, in his capacity as Glendale City Manager,

Defendants and Appellees.

Case No. 14-56440

On Petition for Reconsideration after Appeal from the United States District Court for the Central District of California, Case No. 2:14-cv-1291-PA-AJW
District Judge Hon. Percy Anderson

William B. DeClercq, Esq.
william@declercqlaw.com
DeClercq Law Group, Inc.
225 South Lake Avenue, Suite 300
Pasadena, California 91101
(626) 408-2150
Attorneys for (Proposed) Amicus Curiae
The Nippon Today's Researchers (KINGEN)

CORPORATE DISCLOSURE STATEMENT

The Nippon Today's Researchers Society (KINGEN) is a not-for-profit, non-governmental organization based in Japan. KINGEN receives no financial assistance from any outside group, and is wholly funded by donations from its members. KINGEN has no corporate parent and no other organization has an ownership interest in KINGEN.

INTEREST OF *AMICUS*

Interest of the amicus. KINGEN has great interest in understanding the controversial issue of the "Comfort Women," and has collected a wide range of information and related documents on the subject. KINGEN has a distinctly different view on the "Comfort Women" as compared to the views expressed in *amicus* briefs submitted to the Ninth Circuit Court of Appeals by the interest groups, Korean American Forum of California ("KAFC") and the Global Alliance for Preserving the History of WWII in Asia ("GAPH"). Because the Ninth Circuit panel accepted those briefs and presumably considered them in rendering its opinion, the KINGEN feel compelled to present our

own findings to the Court in support of the plaintiff-appellants' motion for reconsideration *en banc*.

The members of KINGEN have studied Japanese history from various angles, and believe that the current controversy over the "Comfort Women" is driven by a pro-Korean political agenda, coordinated by pro-Korean organizations, with an objective to dishonor and shame the Government of Japan and the Japanese and thereby lower its international standing.

Japanese scholars take exception to the theory that the "Comfort Women" were sex slaves, and argue that the characterization is taken out of its proper historical context and that it is not based on sound historical evidence. In this *amicus* brief, KINGEN wishes to provide the Court with context and reliable sources of information which support the Japanese denial of the "sex-slave" theory, and explains the position of the Japanese government on the issue of "historical responsibility" on the accusation of war crimes by Glendale and pro-Korean groups.

STATEMENT OF AUTHORSHIP AND FUNDING

Counsel for Plaintiff-Appellants had no involvement in the preparation of this brief or the accompanying motion. Counsel for KINGEN is not counsel for any party in this action. However, undersigned counsel discloses to the Court that he represented Plaintiff-Appellants for approximately four months in 2014, commencing after the motion to dismiss was fully briefed and ending in October 2014, before any briefing on the appeal commenced. Counsel further advises the Court that no confidential information of

funds from any party was used in the preparation of this brief or the accompanying motion.

Neither any party nor any counsel for any party contributed any money that was intended to fund preparing or submitting the brief or the accompanying motion. No person—other than *Amicus*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief or the accompanying motion.

ARGUMENT

I. Introduction

Glendale has installed a permanent monument in a public park—in stone and bronze—which sets forth a disputed and controversial view of history. Glendale espouses the point of view of Korean interest groups that over 200,000 "Comfort Women," were "sex slaves" during World War II, and demands that Japan "take historical responsibility" for alleged war crimes.

KINGEN respectfully submits that these statements are not appropriate nor supported by the historical record, and reflect a strongly pro-Korean interpretation of the issue, to the detriment of Japan, resulting in anti-Japanese discrimination in Glendale. Further, Glendale has violated the First Amendment by permanently endorsed one viewpoint while excluding others. In so doing, the panel improperly expanded the scope of *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)—dealing with symbolic speech—and *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996)—dealing with a (non-permanent) written resolution or proclamation. This is an entirely new statement of the law: that a city can

adopt the foreign policy statement of an interest group, in bronze and stone, in a public park, that a foreign nation should be held accountable for war crimes over the objection of its citizens.

The new rule announced by the panel allows statements in favor of a controversial foreign policy agenda of an interest group to be set in stone in a public park. This invites municipalities to engage in all manner of viewpoint-discriminatory speech in public fora by conflating "merely expressive" monuments with proclamations.

II. Japan Denies That the "Comfort Women" Were Enslaved

A. The "Kono Statement" Was a Diplomatic Compromise

In the spring of 2014, the government of Japan began aggressively denying the accusation that the "Comfort Women" were enslaved. The Kono Statement, announced on August 4, 1993, was interpreted as an admission to police and military coerced recruitment of the "Comfort Women." But the statement reveals no use of the words "abduct," "slave," nor an admission that these women were "enslaved by the Japanese Military." However, Kono Statements caused serious misunderstandings internationally, so a blue-ribbon panel of Japanese experts revisited the statement in Spring 2014.

On June 20, 2014, the commission concluded that the Kono statement was not a factual admission of abduction/enslavement of "Comfort Women," but rather a diplomatic concession to Republic of Korea

("ROK"), a formal apology but not an admission of fault, that was intended to bring an end to the dispute.

On February 20, 2014, a high-ranking Japanese official expressed disappointment at the reversal by the ROK. (Appendix, Exhibit A.) Japan felt compelled to support the fragile country of South Korea in its fight against communist threats, especially in the Korean War, during the cold war, and even into the 1990's, in order to maintain warm diplomatic relations with the ROK to keep Japan's good standing with the USA. (*See Id.*)

B. Japan Has Denied the Allegations on Four Separate Occasions

Following the 2014 study, Japan addressed the issue of "Comfort Women" in great detail. Japan explicitly and specifically denied forcible recruitment (abduction or slave hunting), slavery, and the claim that "Comfort Women" numbered 200,000. Japan named ASAHI Newspaper as a propagandist and the main disseminator of alleged disinformation. Japan's official denial started with a statement before the UN Human Rights Committee (CCPR) on July 15, 2014, and Japan's denial has been repeated four times. (Exhs. B, C, D, E & G [summary prepared by KINGEN].) Japan's position to the international community directly contradicts Glendale's accusations, as Japan maintains:

- These are one-sided claims which lack corroborative evidence;
- There is no documentation of state-sponsored abductions of women,

- The claim of "200,000 comfort women" is based upon confusing "Comfort Women" with women volunteer corps.
- The phrase expression "sex slaves" contradicts the facts and it is inappropriate to consider the comfort women system as "slavery" from the perspective of then-current international law.
- Japan objects to the allegation of historical revisionism and maintains it has fully addressed the issue "Comfort Women."

III. Japan Disapproves of Glendale's Monument to the "Comfort Women."

Glendale has disrupted the relationship between Japan and the USA. Japan has expressed support for this citizen lawsuit against the monument in Glendale, and expressed disapproval of another very similar statue in Seoul.

A. Japan Calls Glendale's Monument "Incompatible" and "Regrettable."

On February 21, 2014, the day after plaintiffs filed this action, Mr. Yoshihide Suga, Chief Cabinet Secretary of Japan, gave a press conference, stating: "This installation of a memorial statue by a municipal government in the U.S. is incompatible with the views of the Japanese Government," and "extremely regrettable." Mr. Suga expressed solidarity with the plaintiffs, Japanese, and Japanese-Americans. (Exhibit F)

B. Another Diplomatic Compromise on "Comfort Women": Japan-Korea Agreement of 2015

On December 28, 2015, the Japan-Korea Agreement on "Comfort Women" was announced and the Foreign Minister of ROK, Mr. Yun, specifically addressed the "Comfort Woman" statue in Seoul, as follows:

> The Government of the ROK acknowledges the fact that the Government of Japan is concerned about the statue built in front of the Embassy of Japan in Seoul from the viewpoint of preventing any disturbance of the peace of the mission or impairment of its dignity, and will strive to solve this issue in an appropriate manner through taking measures such as consulting with related organizations about possible ways of addressing this issue. (Exh. H.)

Japan supports for the fragile government of the ROK, in the face of volatile situations in the South and East China Sea, to maintain its alliance with the U.S.A. Nevertheless, Japan requested removal of the statue in Seoul, and the ROK has acknowledged the problem. Similarly, the statue in the Glendale creates friction amongst ethnic groups, and its continued presence in Glendale threatens to destabilize the relationship between the USA and Japan. (Exh. I.)

IV. Who Were the "Comfort Women"?

According to various reports, "Comfort Women" were recruited through advertisements in newspapers (Exh. 6), proprietors of brothels, employment agencies, panders, and other private individuals. As valuable

employees, scholars argue, they were treated with respect. Furthermore, historians claim that as a result of the risk of their work near battlefronts, they received high remuneration. Documents submitted herewith reflect that one "Comfort Woman" deposited in her bank earnings then-equivalent to the purchase price for two houses in Tokyo, in only one year. (Exh. J.)

U.S. Military reports have supported this view of the historical facts. Indeed, the U.S. Government has previously investigated the allegations of atrocities against the "Comfort Women" by the Japanese military, at urging of *amicus* GAPH, without results.

A. U.S. Military Intelligence Report No. 49

On October 1, 1944, the U.S. issued a report, Japanese Prisoners of War Interrogation on Prostitution Report No. 49, prepared by U.S. Office of War Information, Psychological Warfare Team which was attached to U.S. Army Forces India-Burma Theater, APO 689. (Exh. K.) It is based on interrogations of "Comfort Women" captured by the U.S. in Burma. The report concludes: "A 'comfort girl' is nothing more than a prostitute or 'professional camp followers' attached to the Japanese Army for the benefit of the soldiers." (*Id.*, p.1) A summary of the major findings of this report follows:

- "Comfort Women" were recruited by Japanese private-sector agents in May 1942 in Korea for "comfort service," which was a contract wherein the women or their families were paid in advance
- The women's age ranged from 21 to 28.

- Each woman lived, slept and transacted business in a private room.
- The report opines that they lived fairly comfortably.
- The report characterizes the relationship between "Comfort Women" and soldiers as generally amicable and social with numerous instances of marriage proposals and a few marriages.
- The report describes strict regulation to protect the health and safety of the women and their customers.
- The report states that women had time off and were able to refuse a customer if they wished.

(*Id.*) U.S. military interrogations of Japanese prisoners of war in south Asia and southern Pacific areas, held at the U.S. National Archives and Records Administration (NARA), mirror Report No. 49 in the depiction of "Comfort Women" in Manila, the Philippines and Rabaul, Papua New Guinea. (Exhibit L.)

B. Interagency Working Group Report of 2007

In response to the 1998 Nazi War Crimes Disclosure Act, Public Law 105-246, *amicus* GAPH, a Chinese-American organization, persuaded Congress to also authorize and investigation into war crimes by the Japanese resulting in the Japanese Imperial Government Disclosure Act, Public Law 106-567, (2000). The Interagency Working Group (IWG)—consisting of top U.S. government officials—began researching alleged war crimes by the Japanese. After reviewing

over 8.5 million pages, little evidence was reported. (Exhibit P.) Acting Chair Steven Garfinkel acknowledged the disappointment of GAPH, who hoped to unearth massive troves of evidence of Japanese war crimes. (Exhibit Q.)

Despite the U.S. acknowledging a lack of documentation, *amicus curiae* GAPH insists on pressing the "enslavement" theory, seeking redress for "Japan's aggression, invasion, and occupation of mainland Asia and island nations of the Pacific." (Exh. M) But the U.S.A. has no policy regarding "Comfort Women" as a war crime since it was a then-acceptable and legal local practice. (Exh. L, p. 15) But Glendale, following *Amicus* GAPH, ignores the policy of the U.S.

C. Glendale Strains Relations with Japan in Favor of Korea

Glendale's monument has alienated its first sister city, Higashi-Osaka. (Exh. U.) According to KINGEN's study, the mayor of Glendale has visited its relatively new Korean sister cities, Goseong and Gimpo, seven times in the last seven years, but not once stopped in Higashi-Osaka, a few hours from Seoul. By favoring Korea over Japan, Glendale has shunned Japan—an American ally and home of Glendale's sister city dating back to 1960.

D. About *Amicus* GAPH

GAPH was established by Chinese-Americans in northern California with the aim of alleging atrocities by the Japanese military during World War II. GAPH helped write The Rape of Nanjing, by Iris Chang, a controversial text that many Japanese scholars argue lacks credible evidence. GAPH lobbied Congress to

create the IWG, which ultimately failed to unearth documentation of the Japanese military's alleged crimes.

Also, GAPH opposes U.S. diplomatic policy by, among other things, claiming that the San Francisco Peace Treaty of 1951 was controversial, and was invalidated in 1972 by a joint communique between Japan and PROC. (Exh. M.) GAPH hopes Glendale will generate "a formidable popular consensus (which) will compel [] Japan to honor its postwar responsibilities." (*Id.*) In short, GAPH is promoting the "Comfort Women" to lower Japan's standing.

E. Statements of the "Comfort Women"

Historical evidence of Glendale's narrative relies on narrative statements from self-proclaimed "Comfort Women." In The Comfort Women (University of Chicago Press, 2008), author Sarah Soh, Professor of Anthropology at San Francisco State University, has rigorously examined the evidence, concluding:

1. "Comfort Women" were not typically kidnapped. (p.3)
2. "Comfort Women" received advance payments when recruited. (p.9)
3. "Comfort Women" numbered 50,000 at most, not 200,000. (p.24)

Professor Park Yuha of Sejong University in South Korea has resisted the pressure to adopt the ROK version of history:

> "some well-known Korean ['Comfort Woman'] survivors (such as Kim Hak-sun, Pae Pong-gi, and most recently, Yi Yong-su) have given

> different version of testimonial narratives. . . . In particular, the stories of some Korean survivors have varied regarding a crucial issue of the method of their recruitment. . . . In the case of Yi Yong-su, the published account states that she left home at dawn when her age-mate and neighborhood friend Pun-sun knocked on her window and whispered, 'Come out quietly.' Yi recalled: 'I tiptoed out and furtively followed Pun-sun to leave home . . . without letting her mother know.'" ("Comfort Women of the Empire" in 2013 [Korean], 2014 (Japanese, Asahi Newspaper)

But Yi recently revised her statements to allege she was "dragged away by the Japanese military during her sleep" dovetailing with the activists' paradigmatic discourse." (Exh. V.)

By contrast, Special Edition of Bulletin of Showa Kenkyujo collects 33 testimonials from military personnel and civilians, recounting conversations with "Comfort Women," along with Japanese military discipline and attitudes, detailing the strict regulation of soldiers' visits to "Comfort Stations," the mandate that natives of occupied territories be treated as equals, and denials of Hitler's theories of racial supremacy. (Exh. N.) This argues Japanese military was disciplined and that "Comfort Stations" decreased the incidence of rape and prevented disease. (Exhibit O). KINGEN finds these results consistent with prisoners' interrogation reports. Indeed, KINGEN has found no evidence of kidnapping, no evidence of 200,000 "Comfort Women," and no mention of sexual servitude. (Exh. W.)

Glendale, and its *amici*, rely almost exclusively on the narratives of self-identified "Comfort Women" to proclaim the Japanese "guilty" of "war crimes." There has been no tribunal, no sworn testimony, and no such verdict, but the language of the monument in Glendale's Central Park insists otherwise. Permitting a California municipality to act as judge, jury and executioner in a serious matter of international import invites perjury, and insults the process of international criminal courts.

Ironically, Glendale's purported justification for the monument—freedom of expression—actually limits freedom of expression of opposing viewpoints by officially condemning the Japanese military as a criminal.

F. Argument Amongst Academic Historians

Historians are hotly debating the "enslavement" theory, but debate is dead in Glendale Central Park. Those who insist that "Comfort Women" were enslaved have not responded for almost a half year since 50 Japanese historians presented evidence denying enslavement. (Exhibit R).

V. What Is the Real Purpose of the Monument?

Glendale's monument purports to commemorate "200,000 Sex Slaves," but significant historical evidence suggests there were a quarter that many and that the "Comfort Women" were "nothing more than prostitutes or professional camp followers" (Exh. K.) Indeed, none of the Japanese "Comfort Women"—who as a group constituted the greatest number of these women—have made any accusation of enslavement against the military of Japan, nor have they demanded reparations.

This begs the question: why do the proponents of the monument fail to commemorate victims of sexual exploitation and/or alleged war crimes, at any other time, in any other place? Why does not Glendale commemorate prostitutes who worked during the Korean War, Vietnam War, elsewhere? KINGEN respectfully submits that the "Comfort Women" theory espoused by Glendale's monument is a proxy for anti-Japanese sentiment and is part of a campaign to shame and demean the Japanese people, with a goal of Japan's standing as an ally of the U.S.A.

As evidence, KINGEN has has collected images of anti-Japanese demonstrations, rallies and signage around the monuments by Korean and Chinese activists. Although the monuments purport to promote peace, they have become a lightning rod of division. (Exh. S [KINGEN-assembled collage of anti-Japan demonstrations surrounding "Comfort Women" monument].) Therefore, KINGEN maintains that the "Comfort Women" issue is an international political issue, using a hypocritical double standard on women's rights, in order to marginalize Japan and the Japanese today. There have been many atrocities during wars in history and in the world. To single out Japan and to condemn Japanese persistently, in light of the broader context and the complicated history of this issue is tantamount to state-sponsored discrimination and prejudice against the Japanese people.

VI. Plaintiffs and Appellants Can State a Claim

The panel concluded that Plaintiffs' complaint should be dismissed without leva to amend; however, in California, plaintiffs have alleged claims under the

California Constitution Equal Protection and Privileges and Immunities clauses.

Plaintiffs and Appellants should be permitted to amend their federal complaint in light of the analysis above as Glendale's pro-Korean position in light of the vigorous international dispute is a state-sponsored proxy for anti-Japanese-American sentiment in Glendale, California.

Plaintiffs Can State a Claim for Violations of their First Amendment Rights

As alleged in Plaintiffs' complaint, Glendale decided to adopt the monument's language – which was provided and supported by a pro-Korean interest group—while ignoring the objecting views of its Japanese citizens. Glendale's Central Park is a public forum and the City has adopted and set in stone the views of one set of interests while denying the right of others to offer different views of the historical facts and to defend the "trial by monument" in Glendale.

Glendale's statement in the written plaque reads as an out-of-court indictment of Japan—a foreign power—and expresses subtle anti-Japanese animus. The narrative plaque is not a valid "time, place and manner" restriction on speech in a public forum, nor is it mere "expressive speech."

Rather, the written statement set in stone in Glendale's Central Park is an impermissible government subsidy of controversial, highly charged, and internationally relevant speech that adopts the views of a political activist group with anti-Japanese objectives.

In permitting the language of the plaque (separately and distinct from the "expressive" monument of a sitting Korean woman) the panel improperly expanded the scope of *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)—dealing with symbolic speech—and conflated it with the holding of this Court in *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996)—dealing with a (non-permanent) written resolution or proclamation.

The result is an entirely new statement of the law: in reading the opinion, a city could adopt the foreign policy statement of any interest group, and cast it in bronze and stone, in a public park, arguing that a foreign nation should be held accountable for war crimes over the objection of its citizens. The rule announced by the panel would permit cities to engage in all manner of viewpoint discriminatory speech in public fora under the guise of "merely expressive" proclamations.

Given California's troubled history of mistreating Japanese residents, this monument and its one-sided view of history can rightfully be seen as the first step on a slippery slope of government-sponsored anti-Japanese sentiment. If the monument and its incendiary narrative stand, nothing prevents Glendale from adding, as additional "expressive speech," any manner of divisive or exclusionary rhetoric.

CONCLUSION

The "Comfort Women" monument was promoted, funded and created by Korean interest groups and erected three years ago by the City of Glendale, leading to international tensions and disenfranchisement of

the plaintiffs, because Glendale accepted a pro-Korean, anti-Japanese view. Indeed, a very similar statue in Seoul has created diplomatic tensions between Japan and South Korea. Substantial historical evidence and academic scholars question the theory that "200,000 'Comfort Women' were 'sex slaves' of the Japanese military," but Glendale ignored the perspectives of the Japanese and embraced the views of pro-Korean groups. From a Japanese perspective, the monument does not preserve peace nor promote human rights, but rather defames and demeans Japan and the Japanese in the USA.

The Ninth Circuit should rehear the case *en banc* and reverse the ruling of the panel because a failure to act will cause the situation to worsen, resulting in more anti-Japanese monuments promoted by the Korean interest groups, threatening to weaken the U.S.-Japan Security Treaty. Performance of a bilateral security treaty is "greatly dependent on a mutual friendship," as stipulated in the first line of the first paragraph in the Security Treaty. (Exh. T)

The monument threatens the friendship of Japan and the U.S.A. From the perspective of the Japanese members of KINGEN, the "Comfort Women" monument in Glendale is not just a 20-ton bronze memorial; it is a sharp and subversive dagger aimed at the U.S.-Japan Security Treaty, a Trojan Horse that threatens the safety of the Japanese and Japanese-Americans in Glendale. The opinion of the panel suggests improperly that municipalities can intervene in a global diplomatic issue without regard to U.S. policy or the right of its citizens to have equal access to express their viewpoints in a public forum.

Respectfully submitted,

DeClercq Law Group, Inc.

By: /s/ William B. DeClercq, Esq.
Attorneys for (Proposed)
Amici Curiae Nippon
Today's Researchers Society
(KINGEN)

Dated: September 26, 2016

EXHIBIT S TO THE NIPPON TODAY RESEARCH SOCIETY AMICUS BRIEF (SEPTEMBER 26, 2016)

{ Note: These photographs appeared in the appendix to the Nippon Amicus brief. The photo arrangement has been reformatted to fit the booklet format. We have placed all the narration together in sequence, while placing captions on the pages with the matching images. }

ANTI-JAPAN RALLIES AROUND THE STATUES

1. Around the Glendale Statue in USA (1/2)

As of Sept 2016, there are two statues and seven monuments in US. Chinese and Korean groups are planning to erect more statues, and are now deploying anti-Japan activities.

These are the photos of their anti-Japan activities related to around the statue of Glendale city.

[. . .]

Before and after PM Abe's speech in the Congress Chinese and Korean Americans jointly and separately protested in the US. Some held signs "COMFORT WOMEN WERE SEX SLAVES NO COVER UP OF WAR CRIMES!", and some "COMFORT WOMEN DESERVE SINCERE APOLOGY!

No matter what PM Abe says in his speech, they just do accusations against any Japan.

As of Sept 2016, there are two statues and seven monuments in the US. Chinese and Korean groups are planning to erect more statues, and are now deploying anti-Japan activities

Photo: Cabinet PR Office

Prime Minister Shinzo Abe addressed a Joint Congressional Meeting of the US Congress in April 29, 2015 titled "Toward an Alliance of Hope."

He emphasized especially an enhancement of US-Japan security. The speech was applauded by the members with standing ovations.

During the speech protests took place on the Capitol Hill by Koreans and its descents in US.

The Korea Times April 29, 2015
Abe addresses Congress without apology as protests continue By Tae Hong, Korean Times US
http://www.koreatimesus.com/abe-addresses-congress-without-apology -as-protests-continue/

Photos taken at the opening ceremony of the statue (July 30, 2013) Chinanews July 30th, 2013. Glendale, the opening ceremony of comfort girl statue http://www.chinanews.com/gj/ 2013/08-01/ 5111201.shtml https://youtu.be/MwcpgXzeWiA

1. Around the Glendale Statue in USA (2/2)

Before and after PM Abe's speech in the Congress Chinese and Korean Americans jointly and separately protested in the US. Some held signs "COMFORT WOMEN WERE SEX SLAVES NO COVER UP OF WAR CRIMES!", and some "COMFORT WOMEN DESERVE SINCERE APOLOGY!" No matter what PM Abe says in his speech, they just do accusations against any Japan.

"WAR CRIME DENIER NOT WELCOME!"
Lotus Gan, left, and Yize Chen yell with other Chinese American and Korean American protesters as they hold up a photo of Japanese Prime Minister Shinzo Abe during a rally outside of the Japanese Consulate in San Francisco, Tuesday, April 28, 2015 (AP Photo/Jeff Chiu)

"COMFORT WOMEN WERE SEX SLAVES"
"NO COVER UP OF WAR CRIMES!"
Hundreds protest Japanese leader ahead of California visit
By JANIE HAR April 28, 2015 6:53 PM
https://www.yahoo.com/news/hundreds-protest-japanese-leader-ahead-california-visit- 211500694.html?ref=gs

"COMFORT WOMEN DESERVE SINCERE APOLOGY!"
Chinese American and Korean American protesters hold up signs and yell as they rally outside of Japanese Consulate in San Francisco, Tuesday, April 28, 2015. Hundreds of people protested outside the Japanese Consulate Tuesday, calling on Prime Minister Shinzo Abe to apologize for his country's atrocities toward other Asian countries during World War II. The protest came as Abe met with President Barack Obama in Washington, D.C., ahead of the prime minister's three-day visit to California this week. (AP Photo/Jeff Chiu)

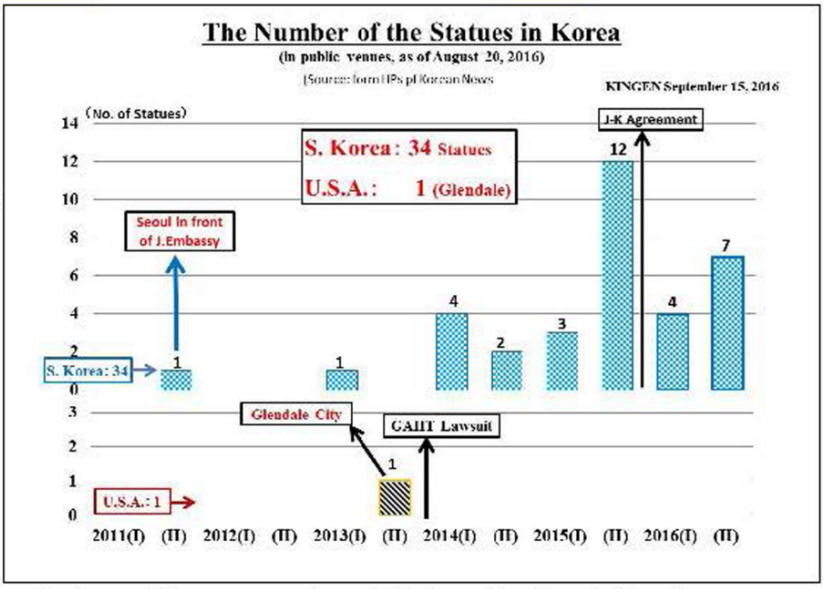
Just after the speech in the Congress
"WAR CRIME DENIER NOT WELCOME!"
Demonstrators gather outside the Millennium Biltmore hotel in downtown Los Angeles during a visit by Japanese Prime Minister Shinzo Abe during a Japan-U.S. Economic Forum on Friday, May 1, 2015. About a hundred people chanted and held signs demanding "justice" for the sexual slaves kept by the Japanese during World War. The protesters, many of Korean or Chinese descent, shouted "Abe, liar!" and held signs reading "Mr. Abe, official apology." Japan maintains that it has already apologized for the sex slaves known as "comfort women" held by its imperial army. (AP Photo/Richard Vogel)

2. Around the Statues . . . "Enslaved Comfort Woman" in South Korea (1/4)

How Contradictory They are! 1. Claiming Justice by the Illegal Statue! 2. Radical/Violent Rallies around the "Peace Monument"

Now 34 statues have been erected all over the South Korea. The first statue was installed in front of the Japanese Embassy in Seoul in December 2011. Even after the Japan-S. Korea Agreement, so far only with 9 months, 11 statues were erected in public venues by private organizations.

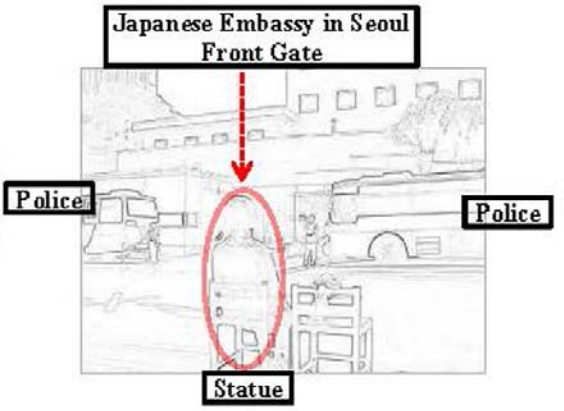
The agreement stipulates refrainment from accusations in international societies, however the Koreans seemingly understand that they could do anything freely in their homeland.



On December 14, 2011, the first slaved comfort girl statue was erected in front of the Japanese Embassy in Seoul. The statue is called "Peace Monument" in South Korea. Since then anti-Japan protesters rally and perform radical anti-Japan activities around the statue.

Source:https://justiceforcomfortwomen.org/category/uncategorized/

The statue faces the front gate of the Embassy. The idea seems to be her angry staring at Japan and Japanese, who never apologize for "their alleged atrocities".



2. Around the Statues . . . "Enslaved Comfort Woman" in South Korea (2/4)

Sino-Korea Alliance against whom?

Two months before the Japan-Korea Agreement, a paired statue of Korean and Chinese girls was unveiled on October 28, 2015. Cooperation between China and Korea was materialized like this.

According to this article "A representative of the South Korean group said similar statues will be set up in Shanghai and San Francisco."

Statues honoring Korean, Chinese 'comfort women' erected in Seoul. (Japan Times Oct. 29, 2015) http://www.japantimes.co.jp/news/2015/10/29/national/politics-diplomacy/statues-honoring-korean-chinese-comfort-women-erected-in-seoul/#.V-I2qSiLTIU

Radical Rallies Against the PM of Japan Are These Expressions of Their Opinions?

Around the statue rallies were performed by anti-Japan activists, who insult the Prime Minister and deface the national flag of Japan. The statue is the symbolic icon of the anti-Japan campaign.

The Himalayan Times August 15, 2015 Protests in South Korea

http://thehimalayantimes.com/multimedia/photo-gallery/protests-in-south-korea/

2. Around the Statues . . . "Enslaved Comfort Woman" in South Korea (3/4)

Do they claim "Peace"? The rallies' main claim is for an official Apology. Does that mean once the government apologized, these campaigns would cease? Does the Government of South Korea keep the promises? So far it has not. So far the government of Japan, based on the agreements made with the South Korean government, announced 3 times that the issue was settled, as "all claims is settled completely and finally" (in 1965), "all settlement by unclear Kono statements", and thirdly J-K Agreement of Dec. 2015 as "final and irrevocable resolution". The first two were broken by South Korea without any apologies so far. The Government of South Korea promised to work for removal of the statue, but Japanese still wait and see how the situations develop.

Protesters defame PM Abe under names of: "Human Rights" "Freedom of Expressions" "Peaceful Societies" and put his face photos under their feet. Do they claim "Peace"?

Photo Caption: "Peace monument" for former "comfort women" during an anti-Japan rally outside the Japanese embassy in Seoul on April 1, 2015 By: Jung Yeon Je. Getty Images. http://en.koreaportal.com/articles/3292/20151030/south-korea-japan-comfort-women-statues.htm

A man (left) wearing a mask of Japanese Prime Minister Shinzo Abe kneels down in a mock apology next to the statue (right) of a teenage girl symbolizing former "comfort women," in Seoul on August 15, 2016 (AFP Photo/ Jung Yeon-Je)

Rejecting a deal announced by the South Korean and Japanese governments, people protest on Dec. 30 at a statue symbolizing "comfort women" in front of the Japanese Embassy in Seoul. PHOTO: REUTERS

2. Around the Statues . . . "Enslaved Comfort Woman" in South Korea (4/4)

"Oppose the Alliance between U.S. and Japan and Japan's Wartime atrocities." (AP)

Former comfort women Kil Un-ock, boom, and Kim Bock-dong who were forced to serve for the Japanese troops as a sexual slave during World War II, shout slogans during a rally against a visit by Japanese Prime Minster Shinzo Abe to the United States, in front of the Japanese Embassy in Seoul, South Korea, Wednesday, April 29, 2015.

Abe has sidestepped a question on whether he would apologize for the sexual enslavement of women by Japan's army during World War II.

The letters at cards read "Oppose the alliance between U.S. and Japan and Japan's wartime atrocities."

(AP Photo/Ahn Young-joon) April 29, 2015. http://www.apimages.com/metadata/Index/South-Korea-US-Japan-Comfort-Women/14f28419b25a4d1a979eb05d13cad00f/312/0

"A Protester Chops an Effigy of Japanese Prime Minister Shinzo Abe with an Axe." (Reuters)

A protester chops an effigy of Japanese Prime Minister Shinzo Abe with an axe during an anti-Japan rally on the occasion of the 70th anniversary of liberation from Japan's 1910-45 colonial rule, on Liberation Day in Seoul, South Korea, August 15, 2015.

http://thehimalayantimes.com/multimedia/photo-gallery/protests-in-south-korea/

Belfast Telegraph (AP Photo/ Yonhap, Kim Ju-Sung)

http://www.belfasttelegraph.co.uk/news/world-news/korean-activist-launches-knife-attack-on-us-ambassador-mark-lippert-in-seoul-leaving-him-with-nerve-damage-and-80-stitches-31042768.html

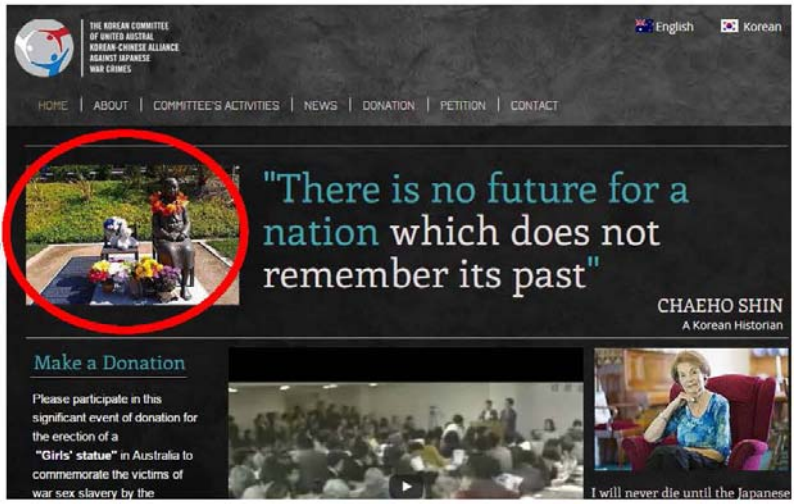
3. The Statue of Glendale in Australia is Used for accusing Japan and generating ethnical frictions, not for peace.

The Korean Committee of United Austral Korean-Chinese Alliance Against Japanese War Crimes (UAKCA)", one of main driving organizations for erecting the statue in Australia, uses in the head of HP (http://designbank.wixsite.com/korean-and-Chinese) a snap shot of the statue of Glendale City for promoting the first similar statue in Australia at a public venue.

According to statements of the HP: UAKCA is determined to have the statue built. "Increase public awareness about the Japanese government's hidden policy of neo-militarism, distortion of war history and war crimes, including the use of sex slaves and the Nanjing Massacre.

Erect a girls' statue that represents those who were forced to work as sex slaves, commonly known as 'comfort women'. The purpose of this statue is to inform growing second generations of Korean and Chinese in Australia and Australian citizens of the brutality and atrocity suffered by hundreds of thousands of women during the Second World War. We would like to further educate the generations to learn the lessons from history so that we can prevent this dark past from happening again in the future."

UAKCA declares that by erecting statues (like one of Glendale), he will educate younger generation about Japanese military's "brutality and atrocity". The statue does not represent a peaceful world, instead generate frictions among ethnics.



Head page of UAKCA HP (printed at 11:00 am(JST) on September 11, 2016)

Photo: Statue in Glendale City

4. The Mayors of the Glendale City (1/3)

Mayor Frank Quintero studied the comfort women in Seoul on April 14, 2013

Ex-Mayor Frank Quintero visits the statue located just in front of the Japanese Embassy in Seoul. 04.14.2013 / News 1

Mayor Frank Quintero with a well-known pro-Communist group- **"The Korean Council for the Women Drafted for Military Sexual Slavery by Japan" (Chong Dae Hyup)**

Mayor Frank Quintero was taken a photo with a representative of “The Korean Council for the Women Drafted for Military Sexual Slavery by Japan” (Chong Dae Hyup), a famous organization very close to North Korea, formed by the South Korean communists. It is said that Chong Dae Hyup was confining surviving women in a nursing home called “House of Nanumu”.

Some of Chong Dae Hyup’s members were arrested as North Korean spies. The issue of comfort women was used by them for its political purpose–to drive a wedge into U.S.-Japan–South Korea security alliances.

Frank Quintero with the Statue and Pro-Communist in front of the Japanese Embassy in Seoul. 04.14.2013 / News 1

4. The Mayors of the Glendale City (2/3)

In merely three and a half months from the study, the statue was erected. Both the Statue and the ceremony followed a well prepared template at an amazing speed and efficiency.

Unveiling Ceremony on July 30, 2013 4 of 5 City Council Members attended Back row from left:

- Zareh Sinanyan
- Ara Najarian (Ex-Major)
- Frank Quintero (Former Mayor)
- Laura Friedman (Former Mayor)

(Source: http://ironna.jp/article/3855)

Four of all five Council members had visited South Korea before this ceremony, and three of them attended the unveiling ceremony. None of them had visited Japan.

The three studied only one-side of the issue.

The three were the all Ex Mayors:

- Frank Quintero

- Ara Najarian

and

- Laura Friedman.

Source: http://ironna.jp/article/3855

4. The Mayors of the Glendale City (3/3)

Ex-Mayor Dave Weaver visits Goseong City on January 15, 2009

Source:http://www.koreadaily.com/news/read.asp?art_id=772034

Then Mayor Frank Quintero visits Goseong City for the first time on September 13-14, 2009

Then Mayor Ara Najarian visits Goseong City on August 26, 2010.

Source:http://www.newsty.net/news/articleView.html?idxno=2442

Ex-Mayor Frank Quintero with the statue in Seoul on April 14, 2013/ News 1

AFTER THE ERECTION IN THE GLENDALE CITY

Then Mayor Zareh Sinanyan on November 17, 2014.

photp@newsis.com 2014-11-17

The present Mayor Paula Devine on July 2-4, 2016

http://www.gndomin.com/news/articleView.html?idxno=114626

THE SOCIETY FOR DISSEMINATION OF HISTORICAL FACT (SDHF) AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND APPELLANTS PETITION FOR RECONSIDERATION EN BANC (SEPTEMBER 26, 2016)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHIKO SHIOTA GINGERY, an individual, KOICHI MERA, an individual, GAHT-US CORPORATION, a California non-profit corporation,

Plaintiffs and Appellants,

v.

CITY OF GLENDALE, a Municipal Corporation, SCOTT OCHOA, in his capacity as Glendale City Manager,

Defendants and Appellees.

Case No. 14-56440

On Petition for Reconsideration after Appeal from the United States District Court for the Central District of California, Case No. 2:14-cv-1291-PA-AJW
District Judge Hon. Percy Anderson

William B. DeClercq, Esq.
william@declercqlaw.com
DeClercq Law Group, Inc.
225 South Lake Avenue, Suite 300
Pasadena, California 91101
(626) 408-2150
Attorneys for (Proposed) Amicus Curiae
The Society Dissemination of Historical Fact (SDHF)

CORPORATE DISCLOSURE STATEMENT

The Society for Dissemination of Historical Fact (SDHF) is a not-for-profit group based in Japan. SDHF receives no financial assistance from any outside group, and is wholly funded by donations from its members. SDHF has no corporate parent and no other organization has an ownership interest in SDHF.

INTEREST OF *AMICUS*

Interest of the amicus. SDHF has a serious interest in this lawsuit. SDHF has been disseminating historical information as related to Japan's modern era for 10 years. This organization has serious interest in the interactions of Japan with neighboring nations during the Pacific War and prior years. The membership of SDHF has authorized and prepared substantial portions of this brief in order to assist the Court in understanding the historical context of the "Comfort Women."

There are numerous academic materials on the topic in Japanese, but only a small fraction of them have been translated into English. As a result, English speaking populations do not have all of the facts and

perspectives available. SDHF has sponsored many articles and books specifically examining the issue of "Comfort Women." However, the information has not reached yet to a large majority of people outside of Japan. The members of Glendale's City Council are not exceptions, nor are some of the judges in California and other parts of the United States. One of the best ways of sharing an overview of the situation is to introduce to this Court the opinions of scholars in the United States and that of Japanese scholars on the issue of "Comfort Women."

Fortunately, since this lawsuit started in February 2014, serious academic discussion started between historians in the United States and those of Japan on this particular issue of Comfort Women. These views have been published in publicly available publications.

STATEMENT OF AUTHORSHIP AND FUNDING

Counsel for Plaintiff-Appellants had no involvement in the preparation of this brief or the accompanying motion. Counsel for SDHF is not counsel for any party in this action. However, undersigned counsel discloses to the Court the he represented Plaintiff-Appellants for approximately four months in 2014, commencing *after* the motion to dismiss was fully briefed and ending in October 2014, *before* any briefing on the appeal commenced. Counsel further advises the Court that no confidential information of funds from any party was used in the preparation of this brief or the accompanying motion.

Neither any party nor any counsel for any party contributed any money that was intended to fund preparing or submitting the brief or the accompanying

motion. No person—other than *Amicus*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief or the accompanying motion.

ARGUMENT

I. THE "COMFORT WOMEN" ARE THE SUBJECT OF INTENSE SCHOLARLY DEBATE ACROSS THE PACIFIC AND THE "HISTORICAL FACTS" ARE FAR FROM SETTLED.

In the plaque accompanying the monument, the City of Glendale declares that there were more than 200,000 "Comfort Women," all of whom were "sex slaves" of the then-government of Japan, which is responsible for "war crimes," suggesting that Japan must "take responsibility." While the plaque is "set in stone" the historical facts are far from agreed, and indeed have generated intense controversy amongst historians and even have involved the government of Japan.

A. The Controversy over "Enslavement" Starts in the United States.

The modern controversy amongst the society of historical researchers has recently come to a head with an article published in a noted academic journal Perspectives on History of the American Historical Association (AHA), the largest professional organization serving historians in all fields in the United States, in its March 2015 edition, concerning "Comfort Women."

The article was written by Ms. Alexis Dudden, a professor of history at the University of Connecticut,

titled with "Standing with Historians of Japan," representing a total of 20 American historians, and began as follows:

"We express our dismay at recent attempts by the Japanese government to suppress statements in history textbooks both in Japan and elsewhere about the euphemistically named 'comfort women' who suffered under a brutal system of sexual exploitation in the services of the Japanese imperial army during World War II." [Appendix, Exhibit 1]

The central allegation in the article argued that the Japanese military had committed atrocities against women during World War II. The article by Ms. Dudden focused on a request by the government of Japan to McGraw Hill Companies, publisher of a world history textbook, *Traditions and Encounters: A Global Perspective on the Past*, to correct some portions of the textbook's depiction of the "Comfort Women."

Ms. Dudden went on to accuse the government of Japan of attempted censorship, arguing that although there was vigorous debate regarding the numbers of women involved, and the role the military played, that nevertheless, the Government of Japan was wrong to deny "the fact that comfort women were enslaved." A vigorous debate over this proposition has roiled the academic community dividing those who preferred to characterize the "Comfort Women" as "enslaved" and those who argued that the facts in the textbook were not documented and that there was little or no evidence that the "Comfort Women" had been "enslaved."

By contrast, as relevant to this case, the City of Glendale had already cast its view of history in bronze and permanently affixed it to a monument in its Central Park. Meanwhile, the professional historians are far less certain–even those who objected to the concerns of the Japanese government–and the debate continues, as it should, amongst academics.

B. The "Enslavement" Controversy Expands to Become an International and Full-Scale Dispute.

Months later, *Perspectives on History* accepted a rebuttal commentary by 50 Japanese historians led by Mr. Eiji Yamashita in its December 2015 issue, entitled On "Standing with Historians of Japan". [Exhibit 2] The Japanese historians identified several factual errors concerning "Comfort Women" described in the textbook, specifically taking issue with an assertion of enslavement, and the failure to reference a crucial document, the *Interagency Working Group Report of 2007*.[1]

The letter of the Japanese historians concluded, "American historians need to make an effort to check the appropriateness of American history textbook in America, across the board, rather than point fingers at the Japanese government when it tries to call attention to these errors of fact." This commentary was

---

[1] U.S. Nazi War Crimes and Japanese Imperial Government Record Interagency Working Group, *The Final Report*, 2007 at https://www.archives.gov/iwg/reports/final-report-2007.html. The report was the result of thorough research by the US National Archive and Records Administration (NARA). Cooperating with OSS, CIA, FBI, etc., taking 7 years and $30 million for investigating Japan and Nazi WWII war crimes based on the bill. Nothing was found on the comfort women.

introduced by a newspaper Japan Times, and comments from readers were invited.

Ms. Dudden responded on December 26, 2015. She chose Japan Times as the forum for debate and sent an article entitled, "Learning from past best way to move forward." (Exhibit 5.) In the article, Professor Dudden at first, criticized a contributor Dr. Jason Morgan, a resident in Wisconsin (Exh. 4) saying he "intentionally misreads my words to create scurrilous fantasy." Secondly, Dudden begs the question by asserting baldly, as if it is a well-established fact for "historians," that, "The history of Japan's state-sponsored militarized system of sexual slavery is an international history," re-asserting the controversial and polarizing "enslavement" theory of "Comfort Women" without citing any evidence or proof.

Professor Yamashita refuted Dudden's position with a paper published in Japan Times on March 9, 2016. [Exhibit 7.] In the paper, he emphasized two points, the lack of proof on enslavement and the inappropriate attitude of the 20 American historians' basic stance as scholars and educators. Yamashita offered authoritative evidence that "Comfort Women" were not enslaved by pointing to a number of papers, documents of Japan and the U.S., eyewitness testimony, and the longstanding denial of Japanese government. Yamashita closed with his serious concern about the attitude of American scholars who are not receptive to new information and insisting a theory without solid evidence. Ms. Dudden and the other 19 historians have not so far responded to Yamashita's rebuttal.

These historical controversies existed, and were raised in the public hearing held before the Glendale

City Council's decision to approve the monument, but the city did not consider any viewpoints other than the promoters of the monument.

C. The "Enslavement" Theory Relies on the Absence of Documents and on Testimonial Accounts of Surviving "Comfort Women."

Those historians who insist that "Comfort Women" were part of a government-sponsored system of sexual enslavement and exploitation that was allegedly controlled and operated by the Japanese military rely upon two additional arguments: (1) unlike the Nazis, who had preserved the documentation of their own war crimes, the then-government of Japan allegedly engaged in a concerted campaign to destroy all unfavorable documents just before and after the end of World War II; and (2) surviving "Comfort Women" have offered first-hand "testimonials" of their experiences. SDHF respectfully submits that these factors are not reliable evidence of the "enslavement" theory.

First, even assuming Japanese some military documents were lost or destroyed, the balance of remaining documents fail to support the enslavement theory. Indeed, many Japanese scholars have argued that the available documents contradict the "enslavement" theory. Japanese historians argue that the absence of documents does not support a conspiracy theory or a cover-up.

"Personal narratives" are the single major source of evidence for the proponents of the "enslavement" theory. However, Japanese scholars note that these "statements" are not "testimony" of the sort imagined in war crime tribunals, but instead are recorded in

non-public places without oath, cross-examination, or supporting documentary evidence.

Scholars studying the issue have also observed that there is an organization which is allegedly "coaching" former "Comfort Women" on constructing narrative testimonies, as described in the English-language book by C. Sarah Soh, *The Comfort Women*.[2] Another book by a Korean scholar, Professor Park Yuha, alleges in her recent book *The Empire of Comfort Women*, that Chong Dae Hyup, an organization located in South Korea, and heavily influenced by North Korea, has been actively coaching former "Comfort Women" to construct testimonies to attempt to shame the Japanese.[3] Indeed, Professor Soh carefully illustrates how the prevailing, simplistic view of the phenomenon overlooks the diversity of the women's experiences, the influence of historical factors and the role that Koreans and others played in causing women to become "Comfort Women." Professor Soh explains how South Korean activists and their supporters have framed alleged human rights abuses as solely a Japanese problem, by attacking the those in the Japanese military in World War II without a frame of reference, and ignoring the ongoing and widespread grave human rights violations of women, especially those working in the sex industry in postcolonial South Korea.

---

[2] Soh, C. Sarah, *The Comfort Women: Sexual Violence and Postcolonial Memory in Korea and Japan* (University of Chicago Press, 2008).

[3] Park, Yuha, 朴裕河、帝国の慰安婦, Asahi Newspaper Co., 2014. English summary at http://scholarsinenglish.blogspot.com/2014/10/summary-of-professorpark-yuhas-book.html

Moreover, with regard to historians' reliance on "personal narrative," pro-Japanese historians may additionally offer testimonial statements, under oath, by officers and soldiers of Japanese Imperial Military. These eyewitnesses have revealed many personal details including their names and places of residence, position and rank, and confesses to the exact nature of sexual activities with the "Comfort Women" in wartime.

These personal narrative testimonies have been published so as to be cross-examined, and the details of these testimonials contradict the theory that the "Comfort Women" were all sex slaves in a systematic, government-sponsored program of war crimes and sexual violence. One of these narratives is translated into English and is attached as Exhibit 7.

SDHF regrets that the City of Glendale has apparently accepted as true, espoused, and literally set in stone, an unfairly pro-Korea version of history that is not accurate, and that draws conclusions that are hotly debated by scholars, and which result in government-sponsored defamation of Japan and Japanese.

SDHF supports human rights and abhors sexual violence and exploitation wherever it may occur; but the City of Glendale has improperly inserted itself into an international dispute and a historical dispute where it does not belong. The appeal of plaintiff-appellants should be reheard *en banc*.

DATED: September 26, 2016

Respectfully submitted,

DECLERCQ LAW GROUP, INC.
By: /s/ *William B. DeClercq, Esq.*
WILLIAM B. DECLERCQ, ESQ.

Attorneys for (Proposed) *Amici Curiae*
SOCIETY FOR DISSEMINATION OF
HISTORICAL FACT (SDHF)