No. 14-56440

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHIKO SHIOTA GINGERY, KOICHI MERA, and **GAHT-US CORPORATION**
Plaintiffs and Appellants,

v.

CITY OF GLENDALE, a municipal corporation
Defendant and Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HON. PERCY ANDERSON, DISTRICT JUDGE • CASE NO. 2:14-cv-1291

APPELLEE'S ANSWERING BRIEF

GLENDALE CITY ATTORNEY'S OFFICE
MICHAEL J. GARCIA
mjgarcia@glendaleca.gov
ANN M. MAURER
amaurer@glendaleca.gov
ANDREW RAWCLIFFE
arawcliffe@glendaleca.gov
613 E. BROADWAY, SUITE 220
GLENDALE, CALIFORNIA 91206
TELEPHONE: (818) 548-2080
Attorneys for Defendant-Appellee

SIDLEY AUSTIN LLP
BRADLEY H. ELLIS
bellis@sidley.com
CHRISTOPHER S. MUNSEY
cmunsey@sidley.com
555 WEST FIFTH STREET, SUITE 4000
LOS ANGELES, CALIFORNIA 90013
TELEPHONE: (213) 896-6000
Attorneys for Defendant-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The District Court had federal question jurisdiction under 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs' disagreement with and decision to avoid a municipal monument commemorating war crime victims creates standing to challenge the monument on foreign affairs preemption grounds.

2. Whether a municipal monument commemorating war crimes victims unconstitutionally usurps the federal government's authority to conduct foreign affairs.

3. Whether the District Court erred in denying leave to amend where amendment would be futile.

INTRODUCTION

The Japanese Imperial Army forced thousands of "Comfort Women" into sexual slavery during World War II. In July 2013, the City of Glendale ("Glendale") authorized placement of a monument to the Comfort Women in a city-owned park, along with a plaque describing their ordeal and commemorating recognition by Glendale and the U.S. House of Representatives of their suffering.

Although Plaintiffs[1] concede the plaque's historical accuracy, they nevertheless contend the monument and plaque offend them. They seek removal of the monument under the guise that its mere presence interferes with the foreign affairs powers constitutionally allocated to the federal government and is therefore preempted.

As the Ninth Circuit has observed, however, "[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 matters "such as foreign policy . . . ." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996). Indeed, "city councils have traditionally made declarations of policy on matters of concern to the community . . . . Even in matters of foreign policy it is not uncommon for local legislative bodies to make their positions known." *Farley v. Healey*, 67 Cal. 2d 325, 328 (1967). Plaintiffs' unprecedented preemption theory would intrude on this "long tradition."

And unprecedented it is. Discomfort caused by historical truth does not create standing, and they are unable to cite any case to the contrary. Moreover, no Supreme Court or Ninth Circuit case has ever subjected nonregulatory, expressive municipal conduct to foreign affairs preemption, and for good reason. If Plaintiffs'

[1] "Plaintiffs" are Appellants Michiko Shiota Gingery, Koichi Mera, and GAHT-US Corporation.

theory were accepted, the results would be profound, calling into question the constitutionality of, among other things, public school curricula, innumerable public memorials, monuments, resolutions, museum exhibits, holidays, library selections, festivals, and other events organized by local governments—a consequence Plaintiffs clearly *welcome*. *See* SER 4–5 n.15 (Plaintiffs arguing below that "Glendale's claim that public school curriculum cannot be preempted by the foreign affairs power is without support."). This "would mark an unprecedented and extraordinary intrusion into the rights of state and local governments[, as] an inherent power of any sovereign government and one that is fundamental to any form of democracy is the ability to communicate with its citizenry." *Alameda Newspapers*, 95 F.3d at 1415.

Standing does not arise from generalized concern for enforcing the foreign affairs power, nor from the asserted injury inflicted by confrontation with facts a plaintiff would rather ignore. But even if Plaintiffs could hypothesize a set of facts under which they had standing, expressive conduct that is nonregulatory and noncoercive is not subject to foreign affairs preemption. The Court should therefore affirm.

STATEMENT OF THE CASE

I. GLENDALE'S MONUMENT TO THE COMFORT WOMEN

On July 30, 2013, Glendale installed a monument and attendant plaque in its Central Park, which is now the subject of this lawsuit. The monument depicts a young girl sitting next to an empty chair with a bird perched on her shoulder. The plaque's inscription 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.

ER 57–58.

U.S. House Resolution 121, referenced on the plaque, explained: "[T]he Government of Japan, during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II, officially commissioned the acquisition of young women for the sole purpose of sexual servitude to its Imperial Armed Forces, who became known to the world as *ianfu* or 'comfort women.'" H.R. Res. 121, 110th Cong. (2007), *available at* https://www.govtrack.us/congress/bills/110/hres121/text. According to the House Resolution, the Comfort Women experienced "gang rape, forced abortions,

humiliation, and sexual violence resulting in mutilation, death, or eventual suicide . . . ." *Id.*

Similarly, in a joint Statement of Interest filed in *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001), the U.S. State and Justice Departments explained that "[t]he horror of plaintiffs' ordeal can scarcely be overstated. There is no dispute about the moral force animating their quest to redress the wrongs done to them. At the conclusion of the Second World War, the United States condemned, in the strongest possible terms, the Japanese Government's conduct before and during the War[, and] conducted War Crimes Trials, which resulted in the execution or other punishment of hundreds of Japanese perpetrators of atrocities." ER 36 (quoting Statement of Interest of the United States of America at 1, *Joo*, 172 F. Supp. 2d 52 (No. 00-CV-02233 (HHK), ECF No. 36.)

House Resolution 121 and the *Joo* Statement of Interest track other factual accounts of the Comfort Women's experience. *See, e.g.*, Cheah Wui Ling, *Walking the Long Road in Solidarity and Hope: A Case Study of the "Comfort Women" Movement's Deployment of Human Rights Discourse*, 22 Harv. Hum. Rts. J. 63, 63–64 (2009). As Professor Ling explained,

> Throughout WWII, the Japanese army directed the establishment of "comfort stations" all over Asia to house the "comfort women" who were to provide sexual services to Japanese soldiers. Official archival research has established how the Japanese military was involved in the largely forced

> recruitment of these women, their subsequent confinement in squalid circumstances, and their sexual and physical abuse.

Id. at 69; *see also* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689, 697 (2003) (describing the Comfort Women as "200,000 women used as sex slaves by [the] Japanese army during World War II").

Perceiving a retreat among certain Japanese officials from the 1993 apology for Japan's role in the Comfort Women system issued by Japan's chief cabinet secretary, Yohei Kono, the House of Representatives adopted the resolution cited in the monument's plaque, urging that the Japanese government "should formally acknowledge, apologize, and accept historical responsibility in a clear and unequivocal manner for its Imperial Armed Forces' coercion of young women into sexual slavery, known to the world as 'comfort women[.]'" H.R. Res. 121, 110th Cong. (2007).

Notwithstanding the House's 2007 resolution, recent comments from the White House demonstrate the vitality of U.S.–Japan relations. Last month, President Obama welcomed to the White House his "partner and friend," Japanese Prime Minister Shinzo Abe. Office of the Press Secretary, White House, *Remarks by President Obama and Prime Minister Abe of Japan in Joint Press Conference* (April 28, 2015), *available at* https://www.whitehouse.gov/the-press-

office/2015/04/28/remarks-president-obama-and-prime-minister-abe-japan-joint-press-confere. The President opened,

> I'm told there's a phrase in Japanese culture that speaks to the spirit that brings us together today. It's an idea rooted in loyalty. It's an expression of mutuality, respect and shared obligation. It transcends any specific moment or challenge. It's the foundation of a relationship that endures. It's what allows us to say that the United States and Japan stand together. Otagai no tame ni—"with and for each other."

Id. The President described the U.S. and Japan as "true global partners." *Id.* In turn, Prime Minister Abe acknowledged "[t]he U.S.–Japan alliance[, is] characterized by the firmness of its bond[.]" *Id.* The Prime Minister offered that "Japan and the United States will together pave the way towards a new era." *Id.*

Responding to a press corps question about the Comfort Women, Prime Minster Abe reflected,

> I am deeply pained to think about the comfort women who experienced immeasurable pain and suffering as a result of victimization due to human trafficking. This is a feeling that I share equally with my predecessors. The Abe Cabinet upholds the Kono Statement and has no intention to revise it. Based on this position, Japan has made various efforts to provide realistic relief for the comfort women.

Id.

Consistent with the remarks of the President and Prime Minister, the White House and Japan "reaffirm[ed] their commitment to enhance their longstanding partnership[.]" Office of the Press Secretary, White House, *Fact Sheet: U.S.–*

Japan Cooperation for a More Prosperous and Stable World (Apr. 28, 2015), *available at* https://www.whitehouse.gov/the-press-office/2015/04/28/fact-sheet-us-japan-cooperation-more-prosperous-and-stable-world.

II. PLAINTIFFS' COMPLAINT

On February 20, 2014, Plaintiffs sued for declaratory and injunctive relief, seeking removal of the monument.[2] First, Plaintiffs alleged that by installing the monument, the City unconstitutionally usurped the federal government's exclusive authority to conduct foreign affairs, a claim they labeled "Unconstitutional Interference With Foreign Affairs Powers." ER 66. They alleged that Glendale "interfere[d] 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." *Id.*

"[S]pecifically," Plaintiffs alleged, the plaque's language reflects "a position at odds with the expressed position of the Japanese government." ER 67. According to Plaintiffs, by "tak[ing] a position in the contentious and politically-sensitive international debate concerning the proper historical treatment of the former comfort women," *id.*, the City intrudes on federal authority. Plaintiffs

[2] Plaintiffs initially sued both the City of Glendale and its City Manager, Scott Ochoa. Plaintiffs voluntarily dismissed Mr. Ochoa shortly thereafter. Pls.' Notice of Dismissal, *Gingery v. City of Glendale*, No. 14-CV-01291 (C.D. Cal. Apr. 10, 2014), ECF No. 14.

assert that this violates the Supremacy Clause and the foreign affairs power. Although the complaint did not identify any particular constitutional provision embodying the foreign affairs power in their claim to relief, it cited to multiple sections of Article II in the statement of jurisdiction: sec. 1, cl. 1; sec. 2, cl. 1; sec. 2, cl. 2; and sec. 3. ER 53.

In Plaintiffs' second claim, they alleged that Glendale's city council violated the Glendale City Charter by failing to follow Robert's Rules of Order when they passed the resolution adopting the monument, rendering it void. Neither claim for relief contains a single allegation specific to the Plaintiffs.

Plaintiff Gingery was Japanese-American and lived "in the vicinity" of the park. ER 54. As alleged, she believed the monument reflects "an unfairly one-sided portrayal" of the Comfort Women and presents "the potential to disrupt the United States' strategic alliances" with Japan and South Korea. *Id.* Ms. Gingery also believed that the monument presents an obstacle to Glendale's sister-city program, of which she was a founding member. *Id.* Ms. Gingery allegedly avoided the park after the monument's installation, and her enjoyment thereof became diminished, because the "position espoused by her city" via the monument caused her "feelings of exclusion, discomfort, and anger[.]" ER 55. Ms. Gingery died after Plaintiffs filed their opening brief. *See* Pls.' Statement Noting Death, *Gingery v. City of Glendale*, No. 14-56440 (9th Cir. Mar. 19, 2015), ECF No. 25.

Plaintiff Mera, who does not live in Glendale, is also Japanese-American and similarly alleged feelings of "alienation." ER 55–56. He "disagrees with and is offended by the position espoused by Glendale through the public Monument." ER 55–56. He perceives in the monument a "pointed condemnation of the Japanese people and government." ER 56. Mr. Mera also alleged avoidance and diminished enjoyment of Glendale's Central Park. *Id.*

Finally, Plaintiff GAHT is a California nonprofit corporation, which seeks "to enhance a mutual historical and cultural understanding between and among the Japanese and American people" by "provid[ing] 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." ER 55. Other than Mr. Mera, the complaint does not identify any GAHT members. Whomever they are, Plaintiffs alleged that they also avoid the park because the monument "distress[es]" them. *Id.* They too experience "feelings of exclusion, discomfort, and anger" because the monument "perpetuates" a "controversial and disputed stance on the debate surrounding comfort women." *Id.*

Despite Plaintiffs' allegations that the monument depicts an "unfairly one-sided," "disputed," and "controversial" portrayal of history, the complaint does not identify any false statements or offer any factual allegations to dispute the

monument's historical accuracy. To the contrary, Plaintiffs conceded its accuracy below. Opposing the City's motion to dismiss in the District Court, in which the City presented background historical exposition, Plaintiffs acknowledged "[t]his lawsuit neither challenges that historical record nor denies in any respect that '[t]he horror of [the Comfort Women's] ordeal can scarcely be overstated.'" SER 2 (quoting Statement of Interest of the United States of America at 1, *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) (No. 00-CV-02233 (HHK), ECF No. 36.)

III. DISTRICT COURT PROCEEDINGS

On April 11, 2014, Glendale filed its Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6), challenging, *inter alia*, Plaintiffs' standing to enforce the foreign affairs doctrine and their claim to relief thereunder. Glendale also filed a Motion to Dismiss Pursuant to California Code of Civil Procedure Section 425.16, California's anti-SLAPP statute. After full briefing, the District Court granted Glendale's 12(b) motion and denied the anti-SLAPP motion as moot.

The District Court held that Plaintiffs lacked Article III standing to assert their federal claim. First, the District Court rejected Plaintiffs' claim that standing exists because their disagreement with the monument caused them to avoid the park. The District Court emphasized the disconnect between Plaintiffs' asserted

injury—offense and disinclination to visit the park—and violation of the foreign affairs power, the asserted constitutional violation. ER 10.

The District Court also distinguished *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008), the case on which Plaintiffs principally rely (both below and on appeal) to support standing. In particular, the District Court noted that in *Barnes-Wallace* the plaintiffs belonged to protected classes excluded by the Boy Scouts, who leased the public land at issue. ER 10–11 (quoting *Barnes-Wallace*, 530 F.3d at 785–86). Thus, a tighter nexus existed between the plaintiffs' constitutional claims and "the presence of such an organization on public land as a deterrent to those plaintiffs' use and enjoyment of that public land." ER 10. Second, the District Court rejected Plaintiffs' claim that the monument's "'potential to disrupt the United States' strategic alliances'" with Japan and South Korea could support Article III standing, relying on *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992) ("[I]t is not sufficient that [plaintiff] has merely a general interest common to all members of the public.") (quotation omitted). ER 11.

Additionally, the District Court observed that Plaintiffs failed to allege facts sufficient to state a cognizable legal theory of foreign affairs preemption. The District Court recognized that the City acted within its traditional municipal competence in "making [a] pronouncement[] of public interest." ER 12 (quoting *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1415 (9th Cir. 1996)).

Therefore, Plaintiffs were required to—but did not—plead facts demonstrating a conflict with federal foreign policy. ER 12–13. To the contrary, the District Court noted that the monument is "entirely consistent with the federal government's foreign policy" as alleged in the complaint. ER 13. For example, the plaque expresses "'sincere hope that these unconscionable violations of human rights never recur,'" and House Resolution 121 "'urg[es] the Japanese Government to accept historical responsibility for these crimes.'" ER 12.

Noting that Plaintiffs had not asked for leave to cure the deficiencies the City identified in its motion to dismiss, and that no amendment could cure them, the District Court expressly concluded amendment would be futile. ER 13. After dismissing the only federal claim asserted, the District Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claim for violation of Robert's Rules of Order and dismissed it without prejudice.[3] ER 13.

This appeal followed.

[3] After the Court's order issued, Plaintiffs pursued both the state law claim and a federal claim identical to that at issue here, as well as equal protection and privileges and immunities claims, in California state court. Glendale successfully moved to dismiss the claims pursuant to California's anti-SLAPP statute.

SUMMARY OF ARGUMENT

The law and the record support the District Court's holding that Plaintiffs lack standing and finding that Glendale's conduct is not preempted.

I. Plaintiffs offer four standing theories. None succeeds.

I.A. Plaintiffs' allegation that the monument may disrupt alliances between the United States and foreign nations is a conclusory, generalized grievance that cannot support standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575–76 (1992).

I.B. Plaintiffs' allegation that they avoid the park and monument therein because it offends them also cannot confer standing, for at least three independent reasons. *First*, Plaintiffs do not contest the monument's historical accuracy, and even as alleged, the monument includes no language conveying the "disapproval" Plaintiffs conclusorily assert causes them "discomfort." *Second*, Plaintiffs cannot justify expanding foreign affairs preemption standing beyond plaintiffs who allege economic harm or criminal sanctions arising from state regulatory schemes, *see, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), to plaintiffs alleging personal offense taken from expressive, nonregulatory conduct, which extension is without precedent. *Third*, Plaintiffs' attempt to liken their standing to that at issue in *Barnes-Wallace* and environmental cases is wrong and illustrates just how tenuous their legal theory is.

I.C. The complaint does not allege that Glendale spent tax dollars on the monument sufficient to sustain municipal taxpayer standing. *See Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 794 (9th Cir. 1999). Nor does Appellants' brief identify a Glendale taxpayer who could assert municipal taxpayer standing.

I.D. Because none of its members has standing, neither does the organizational Plaintiff. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 n.14 (1982).

II.A. Even if they had standing, Plaintiffs cannot demonstrate that a municipality's expressive conduct, in contrast to a coercive state regulatory scheme, is subject to foreign affairs preemption. *See Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 (9th Cir. 2012) (analyzing foreign affairs preemption of state law "subjecting foreign insurance companies to suit in California" rather than being "merely expressive").

II.B. Glendale acted within the scope of traditional municipal competency. *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996) ("Cities, 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 . . . ."). Thus, Plaintiffs must, but do not and cannot, allege a conflict with

federal law to establish conflict preemption. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013).

II.C. Absent a conflict, Plaintiffs do not allege *any* effect on foreign affairs, let alone the "direct impact" sufficient to justify field preemption. *Movsesian*, 670 F.3d at 1077. Rather, at best Plaintiffs have alleged "some incidental or indirect effect in foreign countries," which "is true of many state laws which none would claim cross the forbidden line" and does not offend the foreign affairs power. *Clark v. Allen*, 331 U.S. 503, 517 (1947).

III. Because the District Court expressly found that amendment would be futile, and because Plaintiffs never asked for leave to amend, the District Court properly dismissed the foreign affairs preemption claim with prejudice. *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

STANDARD OF REVIEW

Dismissals for lack of standing and for failure to state a claim for which relief can be granted are reviewed *de novo*. *See Smelt v. Cnty. of Orange*, 447 F.3d 673, 678 (9th Cir. 2006) (standing); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 615 (9th Cir. 2013) (failure to state a claim). This Court "may affirm on any ground supported by the record." *Shanks v. Dressel*, 540 F.3d 1082, 1086 (9th Cir. 2008).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS LACK STANDING

As a threshold matter, the District Court correctly held that Plaintiffs do not have standing to sue Glendale for alleged violations of the foreign affairs power. ER 9–11. As the District Court recognized, Plaintiffs' alleged injury simply cannot be said to arise as a consequence of the asserted constitutional violation. ER 10 ("[E]ven 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 prove error, Plaintiffs must demonstrate an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The complaint alleges the following purported injuries: (1) The monument has the "potential to disrupt" strategic alliances with Japan and South Korea and presents an "obstacle" to friendly relations with Glendale's sister cities in Japan; and (2) the monument causes Plaintiffs feelings of exclusion, discomfort, anger, and offense, which in turn causes them to avoid Central Park.

A. The Monument's Alleged Effect on Strategic Alliances and Sister Cities Is Simply a Generalized Grievance

The complaint alleged that a single Plaintiff, Ms. Gingery, believed that the monument has "the potential to disrupt the United States' strategic alliances" with Japan and South Korea, and that it "represents a significant obstacle in maintaining friendly relations among Glendale's sister-cities," presumably those in Japan. ER 54. Neither "belief" constitutes injury-in-fact, as each is simply a generalized grievance. *See Lujan*, 504 U.S. at 575 ("[I]t is not sufficient that [a plaintiff] has merely a general interest common to all members of the public.") (quotation omitted); *see also Allen v. Wright*, 468 U.S. 737, 754 (1984) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Plaintiffs appear to abandon this argument on appeal, as it is absent from their opening brief.

B. Mere Disagreement With the Monument Is Insufficient to Enforce the Foreign Affairs Power Even If Plaintiffs Also Avoid the Park

Instead, Plaintiffs assert that the monument offends them, and they avoid the public land where it is located as a result.[4] AOB 18. Despite conceding the

[4] It is not clear whether or how the Supremacy Clause and foreign affairs powers are relevant to this standing argument.

historical accuracy of the monument's message, they complain that the monument allegedly conveys a "pointed expression of disapproval of Japan and the Japanese people" and causes them feelings of "exclusion, discomfort, and anger," which in turn diminishes their use and enjoyment of the park.[5] ER 54–55. Plaintiffs claim they avoid using the park because of these feelings and thus have standing to sue. This unprecedented theory has no basis in either fact or law. The District Court properly rejected it. ER 10–11.

1. The Factual Allegations in Plaintiffs' Complaint Undermine Any Claimed Injury

Plaintiffs' allegations belie their claim of injury. *First*, Plaintiffs' perceived "disapproval" is plainly at odds with the allegations in the complaint. The monument attributes wrongs committed against the Comfort Women to the "Imperial Armed Forces of Japan," which no longer exists, rather than to the nation or people of Japan or its current government. ER 7–8. Indeed, the *only* reference to Japanese people is the plaque's dedication "[i]n memory of" the "women who were removed from their homes in . . . Japan . . . to be coerced into sexual slavery . . . ." *Id.*[6] Ms. Gingery alleged that the monument "presents an unfairly

[5] Plaintiffs have not asserted an equal protection claim in this suit, although their equal protection claim in California state court was dismissed with prejudice.

[6] Plaintiffs now also add that the source of offense is the association between Japan and the Japanese people "with alleged war crimes, sexual slavery, and

(continued . . .)

one-sided portrayal" of the Comfort Women, ER 54, but again, Plaintiffs did not, and cannot, allege any false statements or describe what a supposedly balanced account of history would entail. To the contrary, Plaintiffs do not "den[y] in any respect that '[t]he horror of [the Comfort Women's] ordeal can scarcely be overstated.'" SER 2. Plaintiffs' alleged harm is simply inconsistent with the actual language of the monument.

The harm alleged also illuminates the plainly unworkable, subjective standard for evaluating cognizable injury which Plaintiffs' theory contemplates. Under their approach, a plaintiff's *understanding* or *perception*, completely divorced even from the facts as the plaintiff alleges them, could give rise to federal standing. Such an approach is contrary to standing analysis in any context. *See, e.g.*, *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 786 n.6 (9th Cir. 2008) ("Here, the psychological injury is generated primarily ***not by plaintiffs' own beliefs*** but by the Boy Scouts' disapproval of the plaintiffs and people like them.") (emphasis added); *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 (1983) (standing inquiry turned on reasonableness of plaintiff's fears of future harm, "not the plaintiff's subjective apprehensions").

(. . . continued)
'unconscionable violations of human rights.'" AOB 23 (quoting complaint). Harm by "association" is far from the "pointed expression of disapproval" alleged in the complaint, but it is insufficient for the same reason.

Second, the complaint alleges that Plaintiffs "would like to use Glendale's Central Park" but "avoid[] doing so" because they disagree with the monument. ER 55–56. However, Ms. Gingery was the only Plaintiff who lived in Glendale. Because she has died, her claims for injunctive and declaratory relief are moot. *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990) ("Ulaleo died during the pendency of this appeal; his individual claims are thus moot."); *see also* 13C Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.3.1, at 56 (3d ed. 2008) ("Death ordinarily moots a plaintiff's claim for an injunction or like relief, while damages claims may survive.").

The other individual Plaintiff, Mr. Mera, alleges he lives in Los Angeles rather than Glendale. ER 55. His claim to standing therefore is even more tenuous than Ms. Gingery's. Similarly, although the corporate Plaintiff claims to have members in Glendale, the complaint fails to allege the identity of these members, the nature of their memberships, or the corporation's authority to act on its members' behalf. In sum, the operative factual allegations completely undermine Plaintiffs' claim of injury.

2. Plaintiffs' Standing Theory Fails as a Matter of Law

Setting aside these factual deficiencies, however, Plaintiffs' standing argument fails as a matter of law.

a. Preemption Cases Do Not Support Standing

Plaintiffs do not rely on a single preemption case to support their standing analysis. That is not surprising. In each of the Supreme Court preemption cases discussed *infra*, plaintiffs challenged state laws threatening imminent economic harm or even criminal sanctions. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (regulatory scheme put offending businesses at risk of suspended business licenses and of exposure to misdemeanor charges); *Zschernig v. Miller*, 389 U.S. 429 (1968) (legislation put in jeopardy foreign legatees' right to inheritance); *Clark v. Allen*, 331 U.S. 503 (1947) (same); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (legislation "directly and indirectly impose[d] costs on all companies that d[id] any business in Burma"); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (legislation required aliens to register with state authorities or risk fines and imprisonment); *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434 (1979) (legislation imposed ad valorem property tax on foreign-owned cargo containers); *United States v. Pink*, 315 U.S. 203 (1942) (law precluded federal government from taking title to property nationalized by Soviet Union and assigned to the United States).

Ninth Circuit preemption cases are also inapposite. In each, foreign affairs preemption was raised by *defendants* to defeat claims for injunctive or monetary relief, or both. *See, e.g.*, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737

F.3d 613, 617 (9th Cir. 2013) (defendant raised preemption as defense to extended statute of limitations exposing it to otherwise untimely suit and dispossession of property); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012) (defendants raised preemption where legislation subjected them to suit); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009) (defendant raised preemption as defense to legislation providing cause of action, extending statute of limitations, and exposing it to otherwise untimely suit and dispossession of property); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) (defendants raised preemption as defense to legislation creating causes of action for World War II slave laborers and exposing defendants to tort damages). Preemption cases simply provide no support for Plaintiffs' standing argument.

b. *Barnes-Wallace* Is Irrelevant to Whether Plaintiffs Have Standing to Enforce Foreign Affairs Preemption

Without a single preemption case supporting their standing argument, Plaintiffs instead attempt to formulate a standing "rule" from this Court's decision in *Barnes-Wallace* and import it into the preemption context: "Where psychological injury 'interferes with [] personal use of [public] land,'" Plaintiffs argue, "there is standing to bring suit." AOB 22 (quoting *Barnes-Wallace*, 530 F.3d at 784).

Plaintiffs' "rule," however, stretches *Barnes-Wallace* far beyond its facts and doctrinal anchor, and the District Court properly rejected it. ER 10 (describing

Barnes-Wallace as "readily distinguishable"). In that case, plaintiffs had standing to sue the city for leasing public land to the Boy Scouts because, unlike "bystanders expressing ideological disapproval of the government's conduct," the plaintiffs "belong[ed] to the very groups excluded and disapproved by the Boy Scouts," 530 F.3d at 784, which exercised "control" and "dominion" over the land. *Id.* at 784–85. The arrangement required plaintiffs to "pay fees to[] this same organization that believe[d] them inferior in both morals and citizenship." *Id.* at 792 (Berzon, J., concurring); *id.* at 792 n.3 ("Plaintiffs' injury here comes from the requirement of having to directly interact with, and pay fees to the Boy Scouts—the actual *excluders*, themselves—in order to use this land.").

Concurring, Judge Berzon specifically drew on

> the long series of First Amendment cases illustrating that, when plaintiffs are required to choose between either paying a fee to an organization with which they disagree or forgoing an interest to which they are entitled, the existence of an injury-in-fact is simply taken as given. . . . *As here, the decisive element* in those cases was the direct injury to the plaintiff's interests generated in part by the *requirement of interaction with a group with which one did not want to associate, not the mere fact of a disagreement* with the defendant organization.

Id. at 793 (emphasis added).

In contrast, Glendale has not turned over control of Central Park to any organization, and certainly not one that discriminates against, excludes, or condemns Plaintiffs or any group to which they belong. Plaintiffs' complaint does

not allege otherwise. Nor have Plaintiffs alleged that the City itself discriminates against or excludes them or any group to which they belong. *See Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) ("What distinguishes the cases is that in *Valley Forge*, the psychological consequence was merely disagreement with the government, but in the others, for which the Court identified a sufficiently concrete injury, the psychological consequence was *exclusion* or denigration *on a religious basis* within the political community.") (emphasis added).

Instead, Plaintiffs' alleged harm arises simply because they disagree with the message they perceive the monument to express, the accuracy of which they do not challenge. That is insufficient. As Plaintiffs concede, *see* AOB 19, "the psychological consequence presumably produced *by observation* of conduct with which one disagrees" is insufficient "to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 485–86 (1982) (emphasis added); *see also Caldwell v. Caldwell*, 545 F.3d 1126, 1133 (9th Cir. 2008) (offense resulting from a mere "abstract objection" to how the government "presents [a particular] subject" is not sufficient injury as it would turn courts into "a judicial version [] of college debating forums.").

Moreover, Plaintiffs cite to no case, and Glendale is aware of none, applying *Barnes-Wallace* outside the Establishment Clause context.[7] Certainly there is none extending *Barnes-Wallace* to the *foreign affairs preemption* context. That is sensible, given the unique "spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause . . . ." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *see also Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1250–51 (9th Cir. 2007) ("[T]he Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature."). Plaintiffs can make no such claim to a "spiritual stake" in the foreign affairs power.[8]

---

[7] To be sure, *Barnes-Wallace* was an Establishment Clause case. *See Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1071 (9th Cir. 2010) (Graber, J., dissenting in part and concurring in part) (characterizing *Barnes-Wallace* as a "[r]eligious [d]isplay case[]" under the Establishment Clause).

[8] For this reason, Plaintiffs' reliance on other Establishment Clause cases is misplaced. *See Vasquez v. L.A. Cnty.*, 487 F.3d 1246 (9th Cir. 2007) (Establishment Clause challenge to removal of cross from county seal as conveying hostility toward Christians); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (Establishment Clause challenge to placement of cross on federally owned land); *see Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (Establishment Clause challenge to placements of crosses on public property, including city insignia); *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991) (Establishment Clause challenge to municipal ownership of parks with immovable religious statuary).

Similarly, *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000), and *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003), cited for the proposition that in a case "'implicat[ing] *First Amendment*

(continued . . .)

Plaintiffs assert two justifications for extending *Barnes-Wallace* to the foreign affairs preemption context: (1) "The Supreme Court has explicitly rejected the view that standing doctrine under the Establishment Clause is the product of 'special exceptions,'" AOB 21–22 (quoting *Valley Forge*, 454 U.S. at 488); and (2) the Supreme Court applied the same standing analysis from Establishment Clause cases in equal protection cases. *See* AOB 22 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386–88 (2014)). Both arguments misread precedent. *Valley Forge* simply affirmed the need for a concrete, personal harm to enforce the Establishment Clause. 454 U.S. at 488 (reversing Third Circuit's view "that enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege distinct and palpable injury to himself"). And *Lexmark* involved a standing challenge to a Lanham Act claim; it did not address equal protection standing at all.

c. Environmental Cases Likewise Cannot Save Plaintiffs' Lack of Standing

Finally, Plaintiffs look to inapposite environmental cases to fill the analytical gaps in the theory they seek to import from *Barnes-Wallace*. In none of the cases did standing turn on impairment of recreational interest based *only* on subjective

---

(. . . continued)
rights, the inquiry tilts *dramatically* toward a finding of standing,'" are inapt. AOB 23 (first emphasis added).

disagreement with the content of government speech. *See, e.g.*, *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 73–74 (1978) (injury arose from "the environmental and aesthetic consequences of the thermal pollution of the two lakes" by defendant); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183–84 (2000) (injury arose where defendant's excess mercury discharges, "and the affiant members' reasonable concerns about the effects of those discharges, directly affected . . . recreational, aesthetic, and economic interests")[9]; *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005) (standing based on evidence that challenged activity created a greater risk of oil spills, which would "cause a markedly decreased opportunity for OA members to study the ecological area, observe wildlife, and use Cherry Point for recreation," and would cause professional and property harm to OA's director); *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068 (9th Cir. 1997) (standing based on evidence "that the noise, trash and wakes of vessels" from commercial fisherman diminished plaintiffs' enjoyment of a national park).

In sum, Plaintiffs offer no applicable authority supporting their novel standing theory, where disagreement with a municipality's decision to commemorate conceded historical facts would suffice to confer standing in federal

[9] In *Friends of the Earth*, Plaintiffs sued pursuant to a broad citizen-standing statutory provision authorized by Congress. 528 U.S. at 173.

court. *See Allen v. Wright*, 468 U.S. 737, 753 (1984) (rejecting standing based on asserted injury that was not "judicially cognizable"). The mere happenstance that the challenged conduct also touches on international issues cannot change that. *See Valley Forge*, 454 U.S. at 485 (rejecting standing where plaintiffs failed "to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error") (emphasis in original). Instead, Plaintiffs may seek redress for perceived slights through the political process, where they can vote for or against municipal officials who honor the victims of war crimes or undertake any other action which, though it displeases Plaintiffs, fails to give rise to a judicially cognizable injury. *See, e.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468–69 (2009) ("[A] government entity is ultimately accountable to the electorate and the political process for its advocacy. If the citizenry objects [to the message of government speech], newly elected officials later could espouse some different or contrary position.") (citation and quotation omitted).

C. Plaintiffs Do Not Have Standing as Municipal Taxpayers

In the alternative, Plaintiffs assert taxpayer standing. Plaintiffs did not allege or argue taxpayer standing below,[10] and they now assert taxpayer standing

[10] Plaintiffs now cite two paragraphs in the complaint to support their new argument. In one, Plaintiffs allege that Ms. Gingery resided in Glendale. ER 54. In the other, Plaintiffs allege "upon information and belief" that Glendale "provides all necessary maintenance services" for the monument. ER 58.

based *only* on Ms. Gingery's residency in Glendale. *See* AOB 26–27. As discussed *supra*, her claims are moot, and Plaintiffs must established standing without her. *See Ulaleo*, 902 F.2d at 1397.

Additionally, Plaintiffs have failed to allege "the relationship between taxpayer, tax dollars, and the allegedly illegal government activity," *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001), or even to allege *that* Glendale spent tax dollars solely on the monument, *see Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 787 (9th Cir. 2008) ("Without a definite expenditure of municipal funds, plaintiffs do not have standing as municipal taxpayers."); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 794 (9th Cir. 1999) ("[W]hen a plaintiff has failed to allege that the government spent tax dollars solely on the challenged conduct, we have denied standing."). Plaintiffs thus have failed *a fortiori* to allege any specific tax expenditure. *See Cantrell*, 241 F.3d at 683 ("When a plaintiff has failed to allege that the government spent specific amounts of tax dollars on the challenged conduct, we have denied standing."); *Doe*, 177 F.3d at 793 (noting that the Ninth Circuit has found state and municipal taxpayer standing in cases where "the plaintiffs alleged specific amounts of money that the government had spent solely on the unlawful activity," but "when a plaintiff has failed to allege that the government spent tax dollars solely on the challenged conduct, we have denied standing").

In contrast, in the one municipal taxpayer case Plaintiffs cite, the plaintiffs' allegations "set forth their status as state and municipal taxpayers and specifically . . . stated the amount of funds appropriated and allegedly spent by the taxing governmental entities as a result of the Good Friday holiday." *Cammack v. Waihee*, 932 F.2d 765, 771 (9th Cir. 1991) (finding municipal taxpayer standing in Establishment Clause case). Indeed, in *Cammack* "[t]he complaint's allegations include[d] the assertion that $3.4 million in state tax revenues and $850,000 in city tax revenues [were] expended on the holiday." *Id.* at 769.

Consequently, Plaintiffs have not pleaded sufficient factual allegations to carry their burden to demonstrate standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these elements."). Nor have they identified any factual allegations they would add if given the opportunity. *See* AOB 27 (asserting generally that Plaintiffs would plead "additional facts" on remand). Plaintiffs' bald conclusions are insufficient. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

D. Plaintiffs Do Not Have Organizational Standing

Nor can the organizational defendant, GAHT-US, supply the necessary standing. An organization has standing only when its members do. *Friends of the Earth*, 528 U.S. at 181. For the reasons stated above, however, *nobody* is "suffering immediate or threatened injury as a result of the challenged action of the

sort that would make out a justiciable case had the members themselves brought suit." *Valley Forge*, 454 U.S. at 476 n.14. And Plaintiffs base the organization's taxpayer status on Ms. Gingery's residence alone, *see* AOB 29 n.5, which at the very least is now insufficient.

Additionally, an organization may only sue to vindicate interests that are germane to its purpose. *Friends of the Earth*, 528 U.S. at 181. Here, Plaintiffs allege that the purpose of the Global Alliance for Historical Truth is to "provide accurate and fact-based educational resources to the public . . . concerning the history of World War II and related events, with an emphasis on Japan's role." ER 55. But Plaintiffs have conceded the historical accuracy of the Comfort Women's ordeal. They do not explain, and it is not clear, how challenging an accurate factual representation could promote the organization's purpose of "provid[ing] accurate and fact-based" information regarding World War II. Again, Plaintiffs fail to carry their burden of demonstrating standing.

II. GLENDALE'S NONREGULATORY, EXPRESSIVE CONDUCT IS NOT SUBJECT TO FOREIGN AFFAIRS PREEMPTION

Given Plaintiffs' standing defects, this Court need not reach the merits.[11] If this Court does review the merits of Plaintiffs' claims, however, it will find them

[11] Plaintiffs ask this Court to reverse the District Court's standing analysis and then decide the preemption question because "the district court has already signaled *(continued . . .)*

sorely lacking in substance. As the District Court observed, Plaintiffs seek an unprecedented expansion of foreign preemption doctrine. They assert that a city offends the U.S. Constitution when it commemorates a historical event through expressive, nonregulatory conduct, if some foreign government official criticizes the action. Plaintiffs rely exclusively on cases invalidating state regulatory and enforcement schemes. Those cases have no application here. Nor could they: the rule Plaintiffs propose would jeopardize municipalities' "long tradition of issuing pronouncements, proclamations, and statements of principle on a wide range of matters of public interest." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996). Thus, the District Court correctly concluded that 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." ER 12.

(. . . continued)
what it will do on remand" and preemption involves "a purely legal question" that was raised below and briefed. AOB 35–36.

A. Nonregulatory, Expressive Municipal Conduct Cannot Be Preempted by the Foreign Affairs Power

First, there is no authority for subjecting nonregulatory, expressive municipal conduct to a foreign affairs preemption analysis. "[T]he placement of a permanent monument in a public park is best viewed as a form of government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009). Such speech qualitatively differs from the types of state action subject to a foreign affairs preemption analysis, under either conflict or field preemption. Indeed, *every single* case subjecting a state law to foreign affairs preemption analysis evaluated a regulatory or coercive scheme rather than merely expressive conduct.

Foreign affairs preemption jurisprudence is concerned with regulatory and coercive, as opposed to expressive, state conduct. In *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court evaluated a California statute requiring insurers to make extensive disclosures of information to state regulators for use by private litigants in lawsuits regarding the Holocaust. The legislation put offending businesses at risk of suspension of their business licenses and the possibility of criminal sanctions. *Id.* at 410. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court scrutinized an Oregon statute requiring nonresident aliens seeking inheritances from Oregonian relatives to demonstrate that their countries of origin granted various reciprocal inheritance rights to U.S. citizens. A claimant's failure to make such a showing resulted in escheat of the inheritance. *Id.* at 430. And in

Clark v. Allen, 331 U.S. 503 (1947), the Supreme Court upheld a California law governing the right of property succession similar to the one at issue in *Zschernig*.

Indeed, even in cases not squarely presenting broad foreign affairs preemption, offensive state laws have uniformly had a regulatory and coercive character. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000) ("Massachusetts law directly and indirectly impose[d] costs on all companies that do any business in Burma . . . . It sanction[d] companies promoting the importation of natural resources controlled by the Government of Burma, or having any operations or affiliates in Burma. The state Act thus penalize[d] companies . . . .")[12]; *Hines v. Davidowitz*, 312 U.S. 52 (1941) (Pennsylvania statute required aliens to register once each year; provide information to the Department of Labor and Industry; pay an annual registration fee; carry an alien identification card at all times; and show the card whenever it may be demanded by any police

[12] The Supreme Court affirmed on statutory preemption grounds and expressly declined to undertake a more generalized foreign affairs preemption analysis. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) ("Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue . . . or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause.").

officer, and subjected offenders to fines and imprisonment)[13]; *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434 (1979) (California law imposed ad valorem property tax on foreign-owned cargo containers under the Commerce Clause); *United States v. Pink*, 315 U.S. 203 (1942) (state law regulated property distribution to the extent it would preclude the federal government from taking title to property nationalized by Soviet Russia and assigned to the United States pursuant to treaty).

The Ninth Circuit has similarly subjected to foreign affairs preemption analysis only state laws with regulatory or coercive effect—and only when raised by defendants to prevent those effects. In *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013), this Court held that a district court erred in striking down a California law extending the statute of limitations to recover stolen artwork as violating the foreign affairs doctrine. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076 (9th Cir. 2012), addressed a California law which "subject[ed] foreign insurance companies to lawsuits in California."[14] *See also Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954

[13] As in *Crosby*, the Supreme Court struck down the Pennsylvania statute on statutory preemption grounds in light of the federal Alien Registration Act. *Hines*, 312 U.S. at 60.

[14] Plaintiffs also assert that one of Glendale's city council members knew that installing the monument violated the foreign affairs power because he was aware

(continued . . .)

(9th Cir. 2010) (California law created cause of action, extended statute of limitations, and provided superior court jurisdiction over suits to recover art confiscated by the Nazis during the Holocaust); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) (California law created cause of action for individuals forced to provide slave labor during World War II against corporations that employed such labor or their successors-in-interest).

In those cases, the statutes created actual and affirmative duties, obligations, or restraints on economic activity, which in turn gave rise to the invocation of the Supremacy Clause and the federal government's foreign affairs power. None scrutinized nonregulatory, expressive conduct. And as this Court observed in *Movsesian*, the distinction is critical. 670 F.3d at 1077 ("Nor is the statute merely expressive. Instead, the law imposes a concrete policy of redress . . . , subjecting foreign insurance companies to suit in California by overriding forum-selection provisions and greatly extending the statute of limitations for a narrowly defined class.") (footnote omitted). Indeed, the *Movsesian* panel observed, "We need not

---

(. . . continued)
of the *Movsesian* decision when the City voted. AOB 48. Beyond being irrelevant to the constitutional analysis, Plaintiffs' argument rests on misquoting then-Councilmember Sinanyan as stating during the city council meeting that installing the monument was "a moral issue, not a state issue." In fact, Mayor Sinanyan said exactly the opposite: Commemorating the Comfort Women "is a moral issue; ***it's*** a state issue."

and do not offer any opinion about California's ability to express support for Armenians by, for example, declaring a commemorative day." *Id.* at 1077 n.5.

Plaintiffs have not cited a single case preempting nonregulatory, expressive conduct based on the foreign affairs power.[15] Instead, they ignore precedent and make two spurious arguments. First, they attempt to shift the burden to Glendale to demonstrate that preemption *should not* be so aggressively expanded. AOB 46 ("Glendale's arguments before the district court that purely expressive conduct is not subject to foreign affairs preemption is supported by no authority."). Of course, Plaintiffs bear the burden to obtain relief and present authority for their claims.

Second, they argue that because expressive state conduct can violate the Establishment Clause, it can also violate the Supremacy Clause. AOB 46 ("Just as a city cannot erect a monument that violates the Establishment Clause . . . , so too it cannot erect a monument and plaque that violates the Supremacy Clause."). The

[15] Plaintiffs misleadingly cite to *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), to support application of foreign affairs preemption to purely expressive conduct. *See* AOB 46. As noted above, however, the Massachusetts law at issue "directly and indirectly impose[d] costs on all companies that [did] any business in Burma." *Crosby*, 530 U.S. at 379. Moreover, the First Circuit, in a footnote to the very sentence Plaintiffs quote, expressly declined to consider "whether Massachusetts would be authorized to pass a resolution condemning Burma's human rights record but taking no other action . . . . " *Natsios*, 181 F.3d at 71 n.8.

best argument Plaintiffs can muster appears to be that because a local government's completely different conduct (erecting a large cross or expressing "This is a Christian government") can violate an entirely different constitutional provision (the Establishment Clause), Glendale's conduct here violates the Supremacy Clause. *Id.* However, Plaintiffs have offered nothing but *ipse dixit* to support similar application to the Supremacy Clause.[16]

The logical conclusion of Plaintiffs' theory is staggering. Any expressive municipal conduct touching on foreign affairs (including memorials, monuments, parades, dedications, and commemorative days) would become subject to suit. Such a rule would be inconsistent with municipalities' historical expression to the public, *see Pleasant Grove*, 555 U.S. at 470 ("Governments have long used monuments to speak to the public."), and it would prevent local governments from communicating on issues of public concern, a result that is "antithetical to fundamental principles of federalism and democracy."[17] *Alameda Newspapers*, 95 F.3d at 1415.

---

[16] Rather than cite any helpful precedent (which does not exist), Plaintiffs imagine a municipal plaque commemorating "the valiant efforts of ISIL's freedom fighters against the United States" to illustrate the kind of conduct ostensibly foreclosed by field preemption. AOB 46. This purported comparison does nothing to advance Plaintiffs' argument. Apparently, this Court is meant to accept an analogy between honoring war victims and *endorsing a terrorist organization*.

[17] The Court's explanation in *Pleasant Grove* is instructive:

(continued . . .)

But Plaintiffs would go even further. Beyond monuments, memorials, and resolutions, local governments teach controversial issues *directly*, including those touching on foreign affairs. *See, e.g.*, *Griswold v. Driscoll*, 616 F.3d 53, 54 (1st Cir. 2010) (Souter, J., sitting by designation) (rejecting challenge by Turkish families to Massachusetts curriculum guide's treatment of Armenian Genocide). Under Plaintiffs' theory, other discussions of history facilitated by municipalities, most notably through school curricula and textbooks, would be subject to preemption. Indeed, Plaintiffs *endorsed* this position below. *See* SER 4–5 n.15 ("Glendale's claim that public school curriculum cannot be preempted by the foreign affairs power is without support."). As their concession illustrates, Plaintiffs have not offered *any* limiting principle to their expansive application of foreign affairs preemption. If Glendale cannot discuss the historical treatment of

---

(. . . continued)

> A government entity has the right to 'speak for itself.' [I]t is entitled to say what it wishes, and to select the views that it wants to express.
>
> Indeed, it is not easy to imagine how government could function if it lacked this freedom. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467–68 (2009) (citations and quotations omitted).

the Comfort Women, neither can its schools teach historical events with which some may disagree.

The District Court recognized the unprecedented and dangerous scope of Plaintiffs' theory in rejecting their claim:

> 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.

ER 12.

In their brief, Plaintiffs attempt to distinguish the District Court's concerns, noting that the Holocaust "is not subject to any serious debate," that statements regarding its horrors would not "necessarily draw the protest of the German government," and that it has "not been a controversial issue of global politics for several decades." AOB 57. Setting aside Plaintiffs' dubious premise that the Comfort Women issue *is* subject to *serious* debate, their attempt to undermine the District Court's analogy is hopeless. The President of Iran publicly denied the Holocaust as recently as 2009. Note, *Genocide and Insurance: A Review of* Movsesian v. Victoria Versicherung AG, 21 S. Cal. Rev. L. & Soc. Just. 245, 279 n.227 (2012) (quoting former President Mahmoud Ahmadinejad).

Additionally, Plaintiffs do not explain how courts should determine which historical events are "subject" to "serious debate," what events are "controversial issues of global politics," or which statements are likely to "draw the protest" of foreign governments. This is no limiting principle, and these arguments give away the game that, despite their hollow protestations to the contrary, this lawsuit is and always has been completely concerned with drawing the federal (and also California) courts into Plaintiffs' historical dispute.

Subjecting nonregulatory, expressive municipal conduct to preemption analysis would chill local governments from commenting on matters of public interest. Indeed, the use of preemption to foreclose such conduct "would mark an unprecedented and extraordinary intrusion on the rights of state and local governments," *see Alameda Newspapers*, 95 F.3d at 1415, because "[a]n inherent power of any sovereign government and one that is fundamental to any form of democracy is the ability to communicate with the citizenry." *Id.*

The monument does not subject anyone to suit by creating or reanimating a cause of action. *Movsesian*, 670 F.3d 1067; *Von Saher*, 592 F.3d 954; *Deutsch*, 324 F.3d at 708 ("[A] state is generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations . . . ."). It did not enact a regulatory scheme or risk scrutiny of foreign law by federal courts. *Zschernig v. Miller*, 389 U.S. 429 (1968). It certainly did not create the risk of fines or criminal

enforcement. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). In the absence of any regulatory or coercive conduct effect, Plaintiffs fail to demonstrate that Glendale's expressive conduct can be preempted by the foreign affairs power.

B. Plaintiffs Must, but Cannot, Show a Conflict With Federal Law Because Glendale Acted Within Traditional Municipal Authority

Even if nonregulatory, expressive conduct *were* subject to preemption analysis, Glendale's conduct still could not be preempted. Because Glendale acted within the scope of traditional municipal competency as a matter of law, Plaintiffs must allege a conflict with federal law to establish foreign affairs preemption. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013) ("Conflict preemption occurs when a state acts under its traditional power, but the state law conflicts with a federal action such as a treaty, federal statute, or executive branch policy."). As the District Court properly concluded, Plaintiffs' own allegations undermine any claim to conflict preemption.

1. Glendale Acted Within Its Traditional Competency

Glendale's expressive conduct is well within the scope of traditional local activity, as the District Court concluded. *See* ER 12 (characterizing Glendale's resolution as among "the myriad symbolic displays and public policy issues" in which states and municipalities engage). As this Court has held, "[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*** . . . ." *Alameda Newspapers*, 95 F.3d at 1414 (emphasis added). As the California Supreme Court has observed,

> As representatives of local communities, . . . city councils have traditionally made declarations of policy on matters of concern to the community ***whether or not they had power to effectuate*** such declarations by binding legislation. Indeed, one of the purposes of local government is to represent its citizens before the Congress, the Legislature, and administrative agencies in matters over which the local government has no power. ***Even in matters of foreign policy it is not uncommon for local legislative bodies to make their positions known.***

Farley v. Healey, 67 Cal. 2d 325, 328 (1967) (emphasis added); *see also id.* at 326–28 (ordering San Francisco's registrar of voters to place on the ballot a "declaration of policy" "urging an immediate cease-fire and American withdrawal from Vietnam" over the registrar's objection that it did not concern municipal affairs as to which the county could enact binding legislation). Moreover, these "declarations of policy" and "statements of principle" may manifest as monuments. As the Supreme Court recently noted, "Governments have long used monuments to speak to the public." *Pleasant Grove*, 555 U.S. at 470. Indeed, states and cities are dotted with "thousands" of monuments, including those implicating

international issues, like the statue of Pancho Villa in Tucson, Arizona, referenced in *Pleasant Grove*.[18] *See id.* at 471, 476.

Plaintiffs assert that the "long tradition" of municipal proclamations, including on matters of foreign policy, is simply a "red herring" because the monument is not mere "commemoration," but has crossed the purportedly impermissible line into "advocacy." AOB 55 (citing *Alameda Newspapers*, 95 F.3d at 1415). Plaintiffs offer no authority for the argument that "advocacy" is not permissible expression.[19] To the contrary, *Alameda Newspapers* specifically dealt with municipal nonregulatory advocacy, as the city council resolution at issue "proclaimed its views regarding the plight of the work force of the Oakland Tribune, announced its concern over the substantial loss of jobs both to the City and at the newspaper, . . . went on public record in support of the boycott," and "used its moral suasion to urge its citizens to back the boycott." *Id.* at 1409.

Unable to distinguish *Alameda Newspapers*, Plaintiffs instead cite to plainly inapposite decisions invalidating regulatory and coercive state laws creating new causes of action and/or extending statutes of limitation, *see* AOB 44–45 (citing

[18] Plaintiffs' suggestion that Glendale could permissibly commemorate a "U.S. war hero" but not the victims of war crimes lacks any basis in law or reason.

[19] Plaintiffs' distinction between expression and advocacy is specious; political advocacy is at the core of the First Amendment and principles of free expression.

Garamendi, 539 U.S. 396; *Von Saher*, 592 F.3d 954; and *Movsesian*, 670 F.3d 1076); those inviting courts to abrogate devises based on constructions of foreign law, *see* AOB 45 (citing *Zschernig*, 389 U.S. 429); those levying taxes on foreign-owned property, *see id.* (quoting *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434 (1979)); and those requiring aliens to obtain and carry registration cards or risk fines and imprisonment, *see* AOB 49 (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

Unlike those cases, Glendale has simply expressed an opinion on a matter of public interest with which Plaintiffs disagree. Their disagreement is irrelevant, however, to the historical tradition of local governments' exercising their right to speak.

> A government entity has the right to "speak for itself." "[It] is entitled to say what it wishes," and to select the views that it wants to express[.] "It is the very business of government to favor and disfavor points of view." Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."

Pleasant Grove, 555 U.S. at 467–68 (citations omitted).[20]

[20] There is no question that under *Pleasant Grove* the government has free speech rights. Recognizing that neither the Supreme Court nor the Ninth Circuit has directly addressed the issue, *see United States v. Am. Library Ass'n Inc.*, 539 U.S.

(continued . . .)

Plaintiffs offer two other specious arguments to distinguish Glendale's conduct from other, permissible municipal action: (1) Commemorating war crimes victims is different from other public services (like maintaining streets),[21] AOB 54; and (2) the monument is "more than merely commemorative" because it monopolizes its portion of the park and interferes with the public use of that space. AOB 57. Of course, that dedicating a monument to war crimes victims differs from street cleaning is irrelevant to whether the former is permissible. Similarly, Plaintiffs' suggestion that the monument is not expressive because it takes up

---

(. . . continued)
194, 210–11 (2003), Glendale respectfully submits that these rights are grounded in the First Amendment. Applying the First Amendment to local government speech, and thus providing a constitutional protection again federal restrictions on the speech of state and municipal government, serves interests of both federalism and speech. For many citizens, petitioning their state or local government to issue a proclamation, construct a monument, or install a library exhibit, is the most effective way to exercise their speech rights. *Cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (recognizing the importance of collective action in advancing speech rights).

[21] Plaintiffs observe that Glendale's Code of Ordinances does not "provide for Glendale to police or govern foreign nations[.]" AOB 54 n.9. They fail, however, to provide any authority for the proposition that a municipal code circumscribes or is even relevant to determining the traditional and lawful scope of municipal authority for purposes of foreign affairs preemption. Plaintiffs' theory would lead to absurd results: the scope of "traditional" municipal authority would vary by locality depending the content of the particular city code, and would change any time a city enacted a new code provision.

public space is specious and refuted by *Pleasant Grove*. 555 U.S. at 470 (monuments on public land are government speech).

In sum, as a matter of law Glendale acted within the scope of traditional municipal competence in expressing solidarity for the Comfort Women, and Plaintiffs must therefore allege a conflict with federal law. *See Cassirer*, 737 F.3d at 617.

2. Plaintiffs' Factual Allegations Undermine Any Claim of Conflict

Plaintiffs' complaint fails to allege any facts showing a conflict with federal policy. To the contrary, the District Court's order reflects that the monument is fully consistent with federal policy. ER 12. ("[A]s 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.'").

Plaintiffs make no effort on appeal to show that Glendale acted in conflict with some expression of federal policy. *See* AOB 42–43; *id.* at 53–54 ("*Field preemption* precludes Glendale" from installing the monument) (emphasis added). They have not alleged the existence of any federal statute, treaty, executive agreement or order, or any other federal law addressing the Comfort Women. Instead, beyond the United States' Statement of Interest in *Joo* and House

Resolution 121, both of which describe the Comfort Women in terms similar to the monument, they allege only three isolated comments from federal officials:

- 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."

- 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."

- [T]he Assistant Secretary of State for East Asian and Pacific Affairs[] commented that the U.S.'s position on the comfort women issues 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."

ER 64–65.

Consistent with the District Court's analysis, to the extent *any* federal policy on the Comfort Women can be culled from these allegations, it is fully consistent with the monument. The House Resolution expresses the "advocacy" of which Plaintiffs accuse Glendale. Plaintiffs also grossly mischaracterize the United

States' position in *Joo*, which was simply to discourage federal *courts* from resolving nonjusticiable political questions.[22] ER 37. Moreover, the three isolated comments from federal officials at most suggest a policy of promoting dialog and "'conversation[]'" among the United States, Japan, and South Korea. ER 65 (quoting Secretary Kerry's comments urging Japan and Korea to work "*with us*") (emphasis added). None so much as hints at a conflict between Glendale's monument and federal foreign policy.[23]

[22] Plaintiffs' complaint asserts that the *Joo* Statement of Interest warns that merely "addressing the comfort women issue in the United States could disrupt Japan's 'delicate' relations with China and Korea." ER 64. That plainly misstates the Statement, which warned against "***litigation*** of these claims in U.S. court" and "lawsuits" regarding redress for the Japanese military's wrongdoing. ER 35–51 (emphasis added).

[23] Moreover, Plaintiffs conceded in their briefing below other representations from United States officials that are wholly consistent with the monument. SER 2 n.1 (quoting 2013 State Department Spokesperson statement: "'what happened in that era to these women . . . is deplorable and clearly a grave human rights violation of enormous proportions'"); *id.* (quoting 1993 statement of Japan's Chief Cabinet Secretary: "'with the involvement of the [Japanese] military authorities of the day,' the Comfort Women 'suffered immeasurable pain and incurable physical and psychological wounds' that 'severely injured the honor and dignity of' these Women").

Thus, Plaintiffs' complaint falls far short of demonstrating a conflict with some "federal action such as a treaty, federal statute, or executive branch policy."[24] *Cassirer*, 737 F.3d at 617.

C. Plaintiffs Fail to Allege That Glendale's Installation of the Monument, Which Was Within Its Traditional Competency, Had a Direct Impact on Foreign Relations

Plaintiffs also cannot demonstrate that Glendale's conduct offends the Constitution under a field preemption analysis—again, assuming that nonregulatory, expressive conduct is even subject to such scrutiny. "Field preemption occurs when a state, in the absence of any express federal policy . . . intrudes on the field of foreign affairs without addressing a traditional

[24] Because the complaint alleges no conflict, the Court can reject preemption on this ground. To the extent this Court must divine federal foreign policy respecting the Comfort Women, however, the complaint presents a nonjusticiable political question and provides an alternative basis to affirm the District Court's order. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007). Plaintiffs ask the courts to determine and pronounce the content of U.S. foreign policy based solely on its interpretation of isolated and ambiguous comments from certain federal officials.

Indeed, the United States filed the Statement of Interest in *Joo* to advocate nonjusticiability under the political question doctrine, and the D.C. Circuit ultimately dismissed on those grounds. *Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005). Moreover, all six "independent tests" for determining whether a case is nonjusticiable under the political doctrine apply here. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). In particular, the Court cannot conclude a conflict exists without declaring the content of U.S. foreign policy regarding the comfort women, *see Corrie*, 503 F.3d at 982, and there is no judicially discoverable and manageable standard to determine that policy, *see Baker*, 369 U.S. at 217.

state responsibility. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013) (quotation omitted).

At the threshold and as explained above, *see supra* Part II.B.1., Plaintiffs' field preemption theory fails because Glendale acted within the traditional scope of municipal competency. *Id.*

But there is a second, independent reason to reject Plaintiffs' novel application of field preemption: they do not, and cannot, allege *any* cognizable effect on foreign affairs. For this reason alone Plaintiffs fail to justify application of the "rarely invoked doctrine" of field preemption. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1075 (9th Cir. 2012).[25]

Although there are no decisions preempting nonregulatory, expressive municipal conduct under the foreign affairs power, cases evaluating state regulatory schemes and legislatively created judicial remedies illuminate the extent to which state action must directly affect foreign affairs to offend the Constitution. For example, in *Clark v. Allen*, 331 U.S. 503 (1947), and *Zschernig v. Miller*, 389 U.S. 429 (1968), the Supreme Court analyzed whether the reciprocity clauses in

[25] Indeed, *Zschernig* is the "only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power," *Deutsch v. Turner Corp.*, 324 F.3d 692, 710 (9th Cir. 2003), in the absence of a clear conflict, and it "has been applied sparingly," *see id.*; *see also Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 963 (9th Cir. 2009) (field preemption is "seldomly" invoked).

the probate laws of California and Oregon, respectively, which governed the rights of aliens to inherit property from American decedents, intruded on the foreign affairs power.

In *Clark*, the Supreme Court declined to find preemption, rejecting the argument that California's regulatory scheme was "a matter for settlement by the Federal Government on a nation-wide basis." 331 U.S. at 517. The Court observed that property rights were a matter of local law, and that in the absence of conflicting federal policy as evidenced by a treaty, for example, "some incidental or indirect effect in foreign countries" would not offend federal policy. *Id.* Indeed, the Court observed that such an incidental or indirect effect "is true of many state laws which none would claim cross the forbidden line." *Id.*

Oregon's similar reciprocity regime came before the Court twenty years later during the Cold War. *Zschernig*, 389 U.S. 429. Under that regulatory scheme, an alien who sought to collect an inheritance from an Oregonian decedent had to prove that she would "receive the benefits, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries." *Id.* at 432. As the Court noted, inheritance statutes in Oregon and other states had caused probate courts to "launch[] inquiries into the type of governments that obtain in particular foreign nations." *Id.* at 434. In practice, state courts used these laws to deny legatees in

communist countries otherwise rightful inheritances. Critically, the Court reported state courts' "notorious" practice of "withholding remittances to legatees residing in Communist countries . . . ." *Id.* at 440. Because Oregon's law had "a direct impact upon foreign relations," *id.* at 441, rather than the merely incidental one condoned by *Clark*, the Court struck down the statute.

The Ninth Circuit has been similarly circumspect in invalidating state laws on field preemption grounds. Most recently, in *Cassirer*, this Court reversed a district court's erroneous conclusion that field preemption invalidated a California statute providing "a six-year limitation period for the recovery of fine art against a museum, gallery, auctioneer, or dealer." 737 F.3d. at 615. Recognizing that "under *Von Saher*, *Movsesian*, and *Deutsch*, states may not *create their own remedies* to the problem of looted Holocaust-era art or other wartime injuries," or "require their courts to make politically sensitive determinations on matters of foreign policy," this Court concluded that the challenged statute of limitations did "not create a remedy for wartime injuries by creating a new cause of action . . . ." *Id.* at 618 (emphasis in original). Similarly, the Court observed that there was no evidence "that California courts, as in *Zschernig*," were applying the statute of limitations "to establish [the State's] own foreign policy." *Id.* at 619 (quotation omitted).

Like *Cassirer*, Glendale's expressive conduct creates no remedies and invites no judicial scrutiny of any foreign government, including Japan. Plaintiffs primarily rely on language in *Zschernig* that states cannot make their own foreign policy. But, as the discussion above elucidates, such reliance is misplaced. *Zschernig* involved a complex statutory scheme that was "notorious" for preventing otherwise lawful remittances to heirs in Communist countries and had a "direct impact upon foreign relations." 389 U.S. at 440–41.

Thus, like those at issue in *Von Saher*, *Movsesian*, and *Deutsch*, the Oregon law in *Zschernig* invited judicial determinations carrying *remedial* consequences. *See Movsesian*, 670 F.3d at 1070 (law empowered courts to provide legal remedy to insurance claimants); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 958 (9th Cir. 2009) (law empowered courts to order stolen artwork returned to owners of Nazi-appropriated artwork); *Deutsch v. Turner Corp.*, 324 F.3d 692, 707 (9th Cir. 2003) (law empowered courts to award compensation to claimants for slave labor performed during World War II). Plaintiffs' reliance on each is therefore misplaced. Analogizing *judicial* inquiry with its attendant legal consequences to Glendale's monument is simply inapt.[26]

[26] Even ignoring this difference in *kind*, the scrutiny invited by the laws struck down in those cases differs by significant magnitude from Glendale's alleged "advocacy." Courts applying the California statute at issue in *Movsesian* would have had "to decide whether the [insurance] policyholder 'escaped [the Ottoman
(continued . . .)

Indeed, Plaintiffs do not assert that Glendale's actions invite judicial scrutiny of foreign governments. Instead, they allege merely that Glendale has taken a position that is "at odds with" the Japanese government and "inconsistent" with the federal executive branch, and that "Glendale's actions have great potential for disrupting the delicate diplomatic line struck by the Executive Branch on this contentious issue." ER 67. Plaintiffs' opening brief illuminates their theory: Glendale "seek[s] to establish foreign policy by taking sides, casting blame on Japan, and pressuring Japan to 'accept historical responsibility for these crimes.'" AOB 47. This allegedly "risks the relationship between the United States" and Japan and Korea. *Id.* at 52.

Plaintiffs' factual allegations, however, are limited to statements by foreign officials expressing displeasure with Glendale's actions, ER 63–64. That is plainly insufficient. As the case law described above makes clear, field preemption is triggered by state laws that have a direct impact on U.S. *foreign policy*, not merely

---

(. . . continued)
Empire] to avoid persecution[.]'" *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076 (9th Cir. 2012). To interpret the statute at issue in *Von Saher*, "a California Court would necessarily have to review the restitution decisions made by the Dutch government and courts" attendant to World War II reparations. *Von Saher*, 592 F.3d at 976. Even more problematically, the statute at issue in *Deutsch* "sought to create its own resolution to a major issue arising out of the war—a remedy for wartime acts that California's legislature believed had never been fairly resolved." *Deutsch*, 324 F.3d at 712.

by state laws that allegedly have some *de minimis* effect in foreign nations.[27] *See, e.g.*, *Zschernig*, 389 U.S. at 440 (law preempted because it "affect[ed] international relations . . . [and] impair[ed] the effective exercise of the Nation's foreign policy."); *Movsesian*, 670 F.3d at 1077 (law preempted because it "ha[d] a direct impact on foreign relations"). Plaintiffs have not cited a single case in which criticism by foreign officials sufficed to justify preemption. Indeed, holding that such reactions constitute an impermissible effect on foreign affairs for the purposes of preemption would create an unworkable and dangerous standard. If the displeasure of foreign politicians were sufficient to justify preemption, state and local officials would have no way of knowing, before they approved expressive action, whether it was constitutional. Moreover, such a rule would subject all nonregulatory state and local commemorations of historical events to the whims of shifting political opinion in other countries. A monument or museum addressing a particular historical event might be constitutional for years, only to suddenly "become" unconstitutional because new officials in a foreign country disagreed with its message.

[27] Plaintiffs argued before the District Court that field preemption turns on the implications of Glendale's actions "'in foreign countries,' not on U.S. foreign policy." SER 3 n.10. On appeal, they now concede that the effect must be on "foreign policy." AOB 41 ("The Constitution Preempts Municipal Action That Interferes With *Foreign Policy*") (emphasis added).

Thus, despite Plaintiffs' unfounded warnings of regional destabilization, the complaint fails to offer *any* factual allegations of disruptions of U.S. foreign policy in the more than eight months after the monument was unveiled in July 2013. The Court should reject Plaintiffs' conclusory and speculative allegations that Glendale's actions have "great potential" to disrupt U.S. policy in East Asia. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Glendale's expressive act commemorating an historical event has had, and will have, no effect on U.S. foreign policy.

III. BECAUSE AMENDMENT WOULD BE FUTILE, THE DISTRICT COURT PROPERLY DISMISSED THE FEDERAL CLAIM WITHOUT LEAVE TO AMEND

In dismissing Plaintiffs' federal claim with prejudice, the District Court observed that they had "not asked for leave to amend the Complaint to cure the deficiencies" and correctly concluded that no amendment could cure the deficiencies, expressly finding "that any amendment would be futile." ER 13.

First, Plaintiffs' claims, both to standing and as to the merits, lack any legal basis. No additional factual allegations could convert the monument to a regulatory or coercive scheme giving rise either to standing or to preemption. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004) ("A district court does not err in denying leave to amend where the amendment would be futile.") (quotations and citation omitted). *Second*, as the

District Court observed, Plaintiffs never requested an opportunity to amend.[28] Plaintiffs' failure is particularly telling because the District Court put them on notice that there would likely not be a hearing on the motion to dismiss. *See* SER 7. Their claim that they were "never given the opportunity" to request leave to amend is therefore disingenuous. *Third*, despite representing that their pleading deficiencies could be "*fixed easily*," AOB 16, Plaintiffs *still* fail to identify what factual allegations they would add. Plaintiffs only aver broad *categories* of information they could plead after "limited discovery." *Id.* at 17 n.4. They do not identify a single *factual allegation*.

Specifically, Plaintiffs generally represent they could add facts showing Glendale "erected the monument and plaque in order to influence foreign affairs and to discriminate against Japan and the Japanese generally," *id.*, but they do not identify any such facts. They represent that they "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." *Id.* But Plaintiffs identify no such facts (or explain how they could possibly plead facts demonstrating injury to "all Japanese-Americans").

[28] Plaintiffs concede this point. *See* AOB 16 n.3.

Nor should Plaintiffs only now be able to amend to assert an entirely new cause of action, an equal protection claim, *id.*, which they never asserted or even suggested. Plaintiffs' argument would require a district court faced with a legally deficient claim, as to which amendment would be futile, to sift through allegations in the complaint and determine whether any other causes of action could be stated. Plaintiffs offer no authority requiring the District Court to do their work for them.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Dated: May 13, 2015 Respectfully submitted,

GLENDALE CITY ATTORNEY'S OFFICE
Michael J. Garcia
Ann M. Maurer
Andrew Rawcliffe

SIDLEY AUSTIN LLP
Bradley H. Ellis
Christopher S. Munsey

By: /s/ Christopher S. Munsey
Christopher S. Munsey
Attorneys for Defendant-Appellee
CITY OF GLENDALE

RULE 28-2.6 STATEMENT OF RELATED CASES

There are currently no cases pending before this Court that are related to this action.

Dated: May 13, 2015

/s/ Christopher S. Munsey

Christopher S. Munsey

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Appellee's Brief is in 14-point proportionally spaced Times New Roman font, and contains 13,848 words, as counted by my word processing program, exclusive of the portions of the brief excepted by Rule 32(a)(7)(B)(iii).

Dated: May 13, 2015

/s/ Christopher S. Munsey

Christopher S. Munsey

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 13, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Christopher S. Munsey

Christopher S. Munsey

No. 14-56440

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHIKO SHIOTA GINGERY, KOICHI MERA, and **GAHT-US CORPORATION**
Plaintiffs and Appellants,

v.

CITY OF GLENDALE, a municipal corporation
Defendant and Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HON. PERCY ANDERSON, DISTRICT JUDGE • CASE NO. 2:14-cv-1291

SUPPLEMENTAL EXCERPTS OF RECORD VOLUME I OF I – PAGES 1 TO 7

GLENDALE CITY ATTORNEY'S OFFICE
MICHAEL J. GARCIA
mjgarcia@glendaleca.gov
ANN M. MAURER
amaurer@glendaleca.gov
ANDREW RAWCLIFFE
arawcliffe@glendaleca.gov
613 E. BROADWAY, SUITE 220
GLENDALE, CALIFORNIA 91206
TELEPHONE: (818) 548-2080
Attorneys for Defendant-Appellee

SIDLEY AUSTIN LLP
BRADLEY H. ELLIS
bellis@sidley.com
CHRISTOPHER S. MUNSEY
cmunsey@sidley.com
555 WEST FIFTH STREET, SUITE 4000
LOS ANGELES, CALIFORNIA 90013
TELEPHONE: (213) 896-6000
Attorneys for Defendant-Appellee

TABLE OF CONTENTS

Page

Volume I

MAYER BROWN LLP
NEIL M. SOLTMAN (SBN 67617)
nsoltman@mayerbrown.com
MATTHEW H. MARMOLEJO (SBN 242964)
mmarmolejo@mayerbrown.com
RUTH ZADIKANY (SBN 260288)
rzadikany@mayerbrown.com
REBECCA B. JOHNS (SBN 293989)
rjohns@mayerbrown.com
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHIKO SHIOTA GINGERY, an individual, et. al.,

Plaintiffs,

v.

CITY OF GLENDALE, a municipal corporation,

Defendants.

Case No. 2:14-cv-1291-PA-(AJWx)

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6), OR TO STRIKE PURSUANT TO FEDERAL RULE 12(f)

Hon. Percy Anderson

I. INTRODUCTION

Glendale's Rule 12(b) motion offers a lengthy discussion of the history regarding the horrific abuse suffered by the Comfort Women. Mot. at 2-6. This lawsuit neither challenges that historical record nor denies in any respect that "[t]he horror of [the Comfort Women's] ordeal can scarcely be overstated."[1]

The primary question in this case is a legal one that turns on the Constitution's "allocation of the foreign relations power to the National Government," which resulted from the Framers' "'concern for uniformity in this country's dealings with foreign nations.'"[2] In particular, the question is whether Glendale's action constitutes "an intrusion . . . into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[3] The Supreme Court and lower courts have applied this principle with considerable frequency to invalidate a variety of actions that saw state or local governments attempt to establish their own foreign policies.[4]

[1] Statement of Interest of the United States at 1, *Joo v. Japan*, No. 00-CV-2288 (D.D.C.) (filed Apr. 27, 2001) (Declaration of Christopher Munsey Ex. 14). Plaintiffs acknowledge the United States' statement that "[t]here is no dispute about the moral force animating [the Comfort Women's] quest to redress the wrongs done to them" (*id.*), as well as the more recent statement by the State Department that "what happened in that era to these women . . . is deplorable and clearly a grave human rights violation of enormous proportions." Department of State, Daily Press Briefing Transcript, May 16, 2013, at 85-86 (statement of Jen Psaki, State Department Spokesperson) (Munsey Decl. Ex. 17). Plaintiffs likewise acknowledge the statement of the Government of Japan that, "with the involvement of the [Japanese] military authorities of the day," the Comfort Women "suffered immeasurable pain and incurable physical and psychological wounds" that "severely injured the honor and dignity of" these Women. Statement by Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of "Comfort Women," Ministry of Foreign Affairs of Japan (Aug. 4, 1993) (Munsey Decl. Ex. 7).

[2] *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003).

[3] *Zschernig* v. *Miller*, 389 U. S. 429, 432 (1968).

[4] *See, e.g.*, *Garamendi*, *supra*; *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076-77 (9th Cir. 2012) (en banc), cert. denied, 133 S. Ct. 2795 (2013); *von Saher v. Norton Simon Museum*, 578 F.3d 1016, 1029 (9th Cir. 2009), cert. denied, 131 S. Ct. 3055 (2011); *Deutsch v. Turner Corp.*, 324 F.3d 692, 719 (9th Cir. 2003); *Deirmenjian v. Deutsche Bank, A.G.*, 526 F. Supp. 2d 1068, 1089 (C.D. Cal. 2007); *Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims*, 133 Cal. App. 4th 689, 700-01 (2005); *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal. App. 4th 380, 397-98 (2004); *Mitsubishi Materials Corp. v. Superior Court*, 113 (cont'd)

Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S.Ct. 1421, 1438 (2012) (citation and internal quotes omitted).

This principle is of such importance that federal authority is understood to preempt the entire field of foreign relations: "'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). This principle has been echoed repeatedly. *See, e.g.*, *Movsesian*, 670 F.3d at 1072 ("[E]ven when the federal government has taken no action on a particular foreign policy issue, the state generally is not free to make its own foreign policy on that subject."); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1025 (9th Cir. 2009) ("the Supreme Court has found a state law to be preempted because it infringes upon the federal government's exclusive power to conduct foreign affairs, even though the law does not conflict with a federal law or policy."). Glendale's argument that, to establish preemption, "[p]laintiffs must . . . show that the Monument conflicts with [a] federal policy" (Mot. at 20) is therefore plainly wrong.[9]

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 (internal citations omitted); *Movsesian*, 670 F.3d at 1072.[10] But there can be no doubt that Glendale's placement of the Monument had such an effect. Reactions from the highest echelons of the Japanese government—

[9] *Zschernig* is particularly instructive on this point. There, the United States filed an amicus brief **denying** that the Oregon escheat law under review "unduly interfere[d] with the United States' conduct of foreign relations." 389 U.S. at 434. Even so, although the Oregon escheat statute conflicted with no federal law and appeared to regulate property—a traditional area of state responsibility—the Supreme Court held the statute preempted because it "**required value-laden judgments about the actions and policies of foreign nations**." *Movsesian*, 670 F.3d at 1073 (analyzing *Zschernig*). That was a "matter[] for the Federal Government, not for local probate courts." *Zschernig*, 389 U.S. at 437-38.

[10] Glendale's statement that the Monument "has had, and will have, no effect on U.S. foreign policy" (Mot. at 23) is irrelevant to field preemption analysis, where the foreign policy implications are assessed vis-à-vis their effect "in foreign countries," not on U.S. foreign policy.

discrimination on the grounds of race." *Creek*, 80 F.3d at 193. This is unlike expressive associations that have the right, as a group, to pursue discriminatory policies that are antithetical to the concept of equality for all persons. *See Boy Scouts of Am. v. Dale*, 530 U.S. 650, 659-60 (2000); *White v. Lee*, 227 F.3d 1214, 1224 (9th Cir. 2000).

Foreign policy is another constitutionally-grounded limitation on speech by state and local governments. *See* U.S. Const., Art. I, sec. 10, cl. 1 ("No state shall enter into any treaty, alliance, or confederation;" *id*., cl. 3 ("No state shall … enter into any agreement or compact with … a foreign power, or engage in war unless actually invaded"). Thus, "a state may violate the constitution by 'establish[ing] its own foreign policy.'" *Deutsch*, 324, F.3d at 709. The Constitution requires "the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63.

In an attempt to circumvent this basic principle, Glendale asserts that expressive, non-regulatory action simply cannot be preempted by federal law, pointing to the long tradition of state officials issuing proclamations on many subjects. Mot. at 7, 19-20. But that simply is not so. The Supreme Court has recognized that public monuments, like the one here, differ from statements made by speakers, leaflets distributed by individuals, and signs held by protesters, because they "endure [and] monopolize the use of the land on which they stand and interfere permanently with other uses of public space." *Summum*, 555 U.S. at 479.[14] Such a monument is not a transient and hortatory statement;[15] it is a

[14] Glendale's repeated reliance on *Alameda's Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414-15 (9th Cir. 1996) unavailing. In *Alameda*, the circuit found that a city resolution urging citizen support for a local newspaper boycott was neither regulatory nor coercive but rather "a declaration of principle, rather than an exercise of governmental powers." Here, however, the decision to dedicate public land to the plaque, to the exclusion of other messages, is an obvious exercise of the municipality's powers and not merely a declaration of principle.

[15] Even as to such proclamations, *Movsesian* left open whether there were circumstances where foreign affairs field preemption would be appropriate. 670 F.3d at 1077 n.5. In this respect, Glendale's claim that public school curriculum (cont'd)

permanent act of government with a continuing impact on those who see it. Such state and local monuments (and, indeed, other, less permanent displays) repeatedly have been held to violate the Establishment Clause (*see, e.g.*, *Trunk v. City of San Diego*, 629 F.3d 1099, 1125 (9th Cir. 2011) (cross monument violated the Establishment Clause); *Separation of Church & State Comm. v. City of Eugene of Lane Cnty., State of Or.*, 93 F.3d 617, 620 (9th Cir. 1996) (per curiam) (cross placed on public land violated the Establishment Clause), a form of preemption of state action by federal constitutional law.

Aside from extolling the obvious virtues of free speech, Glendale fails to cite a single decision that permits the state to ignore the constitutional limitations on **government** speech. We are aware of no such decisions.

B. Glendale's Plaque Is Not The Speech Of Its Individual City Council Members.

Glendale's attempt to conflate its speech with that of its individual city council members to trigger First Amendment protection also is incorrect as a matter of law. Even if elected officials are afforded "wide latitude under the First Amendment to express their views" (Mot. at 17), the city council as a legislative body does not receive such protection. It is well settled that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Just so here: when the council permitted the emplacement of the Monument, it did so as the Glendale City Council, not as individual council members. The First Amendment does not apply to that decision.

cannot be preempted by the foreign affairs power is without support. Glendale has cited no case in which a foreign affairs challenge to curriculum was made. Nor does *Griswold v. Driscoll* support Glendale in this regard; in that case, the First Circuit held that a school board's decision not to include contra Armenian Genocide viewpoints in its curriculum guide "did not implicate the [plaintiff association's] first amendment" rights. 616 F.3d 53, 60 (1st Cir. 2010). There was no mention of the foreign affairs power. Moreover, the *Griswold* court expressly stated that it was not deciding whether the drafting and revision of school curriculums constitutes government speech and, in fact, expressed skepticism that the doctrine would apply. *Id.* at 59 n.6.

VIII. CONCLUSION

For the reasons discussed above, Glendale's Motion to Dismiss or to Strike should be denied.

Dated: April 28, 2014

MAYER BROWN LLP
NEIL M. SOLTMAN
MATTHEW H. MARMOLEJO
RUTH ZADIKANY
REBECCA B. JOHNS

By: s/ Neil M. Soltman
Neil M. Soltman
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-1291 PA (AJWx)	Date	April 16, 2014
Title	Michiko Shiota Gingery, et al. v. City of Glendale		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Paul Songco	None	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff:	Attorneys Present for Defendant:
None	None

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is an Stipulation Extending Briefing Schedule and Continuing Hearing Date on City of Glendale's Motions to Dismiss and to Strike [Docket No. 25].

On April 11, 2014, Glendale filed motions to dismiss and to strike plaintiff's complaint which are scheduled for hearing on May 12, 2014, at 1:30 p.m. The parties seek an extension to May 12 to file plaintiff's opposition, June 2 to file defendant's reply, and to continue the hearing on the motions to June 16.

After reviewing the stipulation, the Court grants it in part and denies it in part. Plaintiff's opposition to the motions is to be filed on or before April 28. Defendant's reply, if any, is to be filed on or before May 5. The hearing on the motion is vacated and the Court will advise the parties if it desires to have oral argument.

IT IS SO ORDERED.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Supplemental Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 13, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 13, 2015

/s/ Christopher S. Munsey

Christopher S. Munsey