NO. 14-56440

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

vs.

CITY OF GLENDALE, a municipal corporation,

Defendant-Appellee.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Glendale's Answering Brief ("GAB") begins by offering this Court a history lesson regarding World War II Comfort Women. GAB 4–8. But, this case is *not* about the historical record. This case is about the Constitution's "allocation of the foreign relations power to the National Government," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003), and whether Glendale can intrude upon the federal government's *exclusive power* to establish governmental policy with respect to foreign nations.

There presently stands in Glendale's Central Park an 1,100 pound monument and accompanying plaque that castigates the Japanese for their activities during World War II regarding Comfort Women, finds them guilty of alleged human rights violations, and "urg[es] the Japanese Government to accept historical responsibility for [its alleged] crimes." ER 57–58, ¶11.[1] The United States Government has favored diplomacy over chastisement. The monument and plaque have been met with public response and criticism from the highest levels of the Japanese government, up to and including the Prime Minister of Japan. ER 63–64, ¶¶36–42.

By installing the monument and plaque, Glendale decided to arrogate to itself U.S. foreign relations regarding Japan and Comfort Women. It believes that

[1] "ER" refers to the Excerpts of Record filed with Plaintiffs-Appellants' Opening Brief.

a small municipality in California has the moral responsibility to call to account a close ally of the United States for its World War II activities. GAB 37. Convinced that it may serve as the moral compass for the world, Glendale argues that no person in Glendale, surrounding Glendale, or anywhere else has standing to challenge its unconstitutional conduct because, in its view, a municipality's expressive conduct is not subject to foreign affairs preemption. GAB 2–3. Glendale's sweeping argument is that a municipality can say whatever it wishes on important matters of foreign affairs without any constitutional constraint whatsoever. GAB 39. Glendale can point to no case—because no case exists—that supports its illogical rule immunizing municipal conduct directed at foreign affairs from constitutional scrutiny.

As shown in Appellants' Opening Brief ("AOB"), Plaintiffs' psychological injury *coupled with* the loss of enjoyment and use of Glendale's Central Park on account of the installation and maintenance of an unconstitutional monument and plaque is precisely the type of injury-in-fact that this Court has found sufficient for purposes of standing in numerous cases. AOB 22–23. Glendale's arguments against standing miss the mark altogether. This is not a generalized grievance (GAB 18), as this case plainly fits within the standing rules announced in *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008) (recently reaffirmed as the standing law of this Circuit by *Barnes-Wallace v. City of San Diego*, 704 F.3d

1067, 1076–78(9th Cir. 2012)). Under *Barnes-Wallace*, Plaintiffs have suffered injury-in-fact because Glendale's unconstitutional placement of the monument and plaque in Glendale's Central Park causes them emotional harm *that prevents them* from using the Central Park and its Adult Recreation Center, and thus denies them full enjoyment of the park's benefits. ER 54–56, ¶¶6–8; ER 66, ¶¶51–53; *Barnes-Wallace*, 530 F.3d at 785. In addition to standing based on *Barnes-Wallace*, there is also municipal taxpayer standing (or, at a minimum, substantial reasons for granting leave to amend), and organizational standing.

Glendale's arguments on the merits fare no better. First, according to Glendale, there is a "long tradition" of municipal governments taking positions on matters of public interest including foreign policy, and thus Glendale argues it is acting within the scope of traditional municipal competency. GAB 2, 15. Its "long tradition" argument, supported by one very broad statement from an inapposite Ninth Circuit case from 1996, is that Glendale effectively has carte blanche to say whatever it wishes concerning "'a wide range of matters of public affairs [such as] foreign policy'" regardless of whether it violates the Constitution. GAB 2 (quoting *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996)). However, case law is clearly to the contrary. Just because a government may have some speech rights, "[t]his does not mean that there are no restraints on government speech . . . . For example, government speech must comport with the Establishment

Clause," and "advocacy may be limited by law, regulation, or practice." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468–69 (2009). As Justice Stevens summarized, "even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions." *Id.* at 482 (Stevens, J., concurring). Here, Glendale's actions are subject to the Constitution and foreign affairs preemption.

Second, according to Glendale, this monument and plaque are consistent with U.S. foreign policy because they reference a nonoperative U.S. House Resolution that "expresses the sense of the House of Representatives." H.R. Res. 121, 110th Cong. (2007), *available at* https://www.govtrack.us/congress/bills/110/hres121/text. Of course, such a resolution cannot establish U.S. foreign policy. The question is not whether Glendale's actions are in accord with the actions of *some* federal officials, but whether the field is *preempted*. Field preemption precludes Glendale from expressing a distinct political point of view on a specific matter of foreign affairs and urging an important ally of the United States to accept responsibility for alleged human rights violations.

Third, Glendale argues that there is no effect on foreign affairs. GAB 16. This Court should be fully aware of the direct impact that Glendale has had and continues to have on foreign affairs. As explained by Chief Cabinet Secretary Yoshihide Suga in a press conference on February 25, 2015, "the establishment of

comfort women statues and memorials in the United States runs entirely counter to the position of the Japanese Government and our efforts thus far, and is deeply regrettable. . . . In this context, we believe it is inappropriate for private organizations to bring into civic life matters such as the comfort women issue on which people have entirely different views depending on their country of origin." Prime Minister of Japan and His Cabinet, *Press Conference by the Chief Cabinet Secretary* (February 25, 2015), *available at* http://japan.kantei.go.jp/tyoukanpress/201502/25_a.html. The position of the United States Government also illustrates Glendale's overreaching. Ambassador Caroline Kennedy stated on April 12, 2015 that regarding the "Comfort Women" issue the United States' "interest is *to encourage the countries* to work together and resolve those differences." *60 Minutes* (CBS television broadcast April 12, 2015), *available at* http://www.cbsnews.com/videos/the-attack-on-sony-ambassador-kennedy-rush-to-judgment/ (emphasis added).

In contrast to the delicate approach outlined by Ambassador Kennedy (who, unlike Glendale, speaks for the United States), Glendale has opted to install an 1,100 pound monument and plaque that convicts Japan without a trial of war crimes allegedly committed during World War II and advocates that "the Japanese Government [] accept historical responsibility for these crimes." ER 57–58, ¶11. Of course, as Glendale's brief notes, Japan has already accepted responsibility and

endeavored to provide realistic relief through the Kono statement. GAB 7. Thus, Glendale is advocating as a matter of U.S. foreign relations that Japan do more than it has already done and more than the United States Government has requested that it do. This Glendale cannot do.

Besides violating the Constitution, this is also counterproductive to Glendale's stated goal of commemorating Comfort Women. As recently explained in an open letter signed by hundreds of leading historians from America's very top universities, "exploitation of the suffering of former 'comfort women' for nationalist ends . . . makes an international resolution more difficult and further insults the dignity of the women themselves. . . . [W]e believe that only careful weighing and contextual evaluation of every trace of the past can produce a just history. Such work must resist national and gender bias, and be free from government manipulation, censorship, and private intimidation." Open Letter in Support of Historians in Japan (March 2015), *available at* https://networks.h-net.org/system/files/contributed-files/japan-scholars-statement-2015.5.4-eng_0.pdf**.** This Court should therefore reverse the district court.

ARGUMENT

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

As explained in Appellants' Opening Brief (at 18-26), Plaintiff Koichi Mera has suffered injury-in-fact because Glendale's unconstitutional placement of the monument and plaque in Glendale's Central Park causes him psychological harm *that prevents him* from using the park and its Adult Recreation Center, and thus denies him full enjoyment of the park's benefits. ER 55–56, ¶8.[2] Plaintiff Mera avoids using and enjoying Glendale's Central Park and its Adult Recreation Center so long as the monument and plaque remain in place on account of strong feelings of exclusion, discomfort, humiliation, and anger directly caused by the unconstitutional monument and plaque. *Id.* Plaintiff Mera has personally suffered injury-in-fact that is traceable to Glendale's conduct, and a favorable decision is likely to redress his injuries. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiff GAHT-US similarly has standing because its members suffered the same injury-in-fact (and thereby have standing to sue in their individual

[2] Because of Plaintiff Gingery's death, Pls.' Statement Noting Death, *Gingery v. City of Glendale*, No-14-56440 (9th Cir. Mar. 19, 2015), ECF No. 25, the Plaintiffs are now Mera and GAHT-US.

capacities), the suit is germane to the organization's purpose, and individual participation is not required. AOB 28–30.

Contrary to Glendale's assertion (GAB 18), Plaintiffs are not alleging a generalized grievance. Plaintiffs have suffered a distinct and palpable psychological injury that prevents them from using Glendale's Central Park. ER 54–56, ¶¶6–8. Indeed, the fact that the plaintiffs avoid using the Central Park because the plaque is understood by them to disapprove of their nation of origin and of the Japanese people also takes this case outside of the generalized grievance category, as Plaintiffs are Japanese-Americans who live in close proximity to the Central Park. Plaintiffs must endure the humiliation of living in close proximity to a park that contains a plaque condemning Japan and the Japanese people—the Plaintiffs' country of origin and people—as war criminals who must accept responsibility for alleged human rights violations. This is not a generalized grievance. *Cf. Catholic League for Religious & Civil Rights v. City and Cnty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) ("It would be outrageous if the government of San Francisco could condemn the religion of its Catholic citizens, yet those citizens could not defend themselves in court against their government's preferment of other religious views."). Furthermore, simply because a harm is widely shared does not necessarily render it a generalized grievance, especially

where a concrete and particularized injury is alleged by a plaintiff. *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 909–10 (9th Cir. 2011).

Next, Glendale argues that psychological injury coupled with an inability to use the Central Park is not an injury-in-fact because this is just "mere disagreement." GAB 18–20. Yet, *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008), makes short shrift of Glendale's arguments. In that case, the plaintiffs, a lesbian couple (the Breens) and an atheist couple (the Barnes-Wallaces) averred that they would like to use a public park in which the land had been leased to the Boy Scouts, "but avoid[ed] doing so because they [we]re *offended* by the Boy Scouts' exclusion, and publicly expressed disapproval, of lesbians, atheists and agnostics." *Barnes-Wallace*, 530 F.3d at 784 (emphasis added). Although the "plaintiffs never applied [with the Boy Scouts] to use the Youth Aquatic Center or Camp Balboa" and no evidence showed that they were "actively excluded" from the land, *id*. at 782, this Court held they had Article III standing because "they *would like to use* Camp Balboa and the Aquatic Center, but they have avoided doing so because they *object to the Boy Scouts' presence* on" the land, and because "[t]hey *do not want to view signs posted* by the Boy Scouts." *Id*. at 784 (emphasis added). Thus, the plaintiffs' avoidance of the public park as a result of the Boy Scouts' public displays constituted sufficient injury-in-fact. As this Court explained, "they have alleged injuries beyond 'the psychological

consequence presumably produced by observation of conduct with which [they] disagree[],' *because their inhibition interferes with their personal use of the land*." *Id*. (citation omitted and emphasis added).

Plaintiffs' injury here is their inability to visit and enjoy Glendale's Central Park without experiencing the unconstitutional monument and plaque. Plaintiffs allege both a personal interest in use of the public land and injury from use of the land that they regard as offensive. *Id*. at 785–86. Plaintiffs' allegations meet the *Barnes-Wallace* test for standing. AOB 18–26.

Faced with the fact that *Barnes-Wallace*, as controlling law of this Circuit, supports standing, Glendale makes three arguments that miss the mark. First, Glendale tries sophistry. They argue there is no injury because "the monument attributes wrongs committed against 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." GAB 19. Put another way, Plaintiffs, as Japanese-Americans, cannot be injured, in Glendale's view, because they were not part of the Imperial Armed Forces of Japan. Of course, the Japanese Government is responsible for its armed forces, and such forces act only as extensions of the sovereign and the people whom the sovereign represents. To say that Glendale's castigation of the "Imperial Armed forces of Japan" is not a critique of the Japanese Government and the Japanese people is nonsense. Lest there be any

doubt, the plaque urges *the present-day Japanese Government* to "accept historical responsibility for these crimes." ER 57–58, ¶11. The Japanese Government represents the Japanese people. Glendale is urging the Japanese people, through their government, to accept responsibility for alleged crimes. Glendale's argument that this is not about "the nation or people of Japan or its current government," GAB 19, is dishonest.

Second, Glendale argues that the injury alleged is too subjective to be workable as a basis for standing. GAB 20. Of course, the injury here is not mere subjective injury, but psychological injury coupled with an inability to use public land. This plainly confers standing under *Barnes-Wallace* because when a psychological injury interferes with personal use of public land, there is standing to sue. *Barnes-Wallace*, 530 F.3d at 784–85. Glendale's view as to what is workable has already been resolved by a prior panel of this Court in *Barnes-Wallace* in favor of standing.

Third, Glendale tries to impose a residency requirement for purposes of standing. GAB 21. Yet, *Barnes-Wallace* does not require that the plaintiff actually live in the city where a park is located. This makes sense because those who live in close proximity to a park, as in the case of Plaintiff Mera, may still have a personal interest in using the land. Rather, all that is required is that the plaintiff aver that they are unable but willing to use a park where an

unconstitutional monument is installed. *Barnes-Wallace*, 530 F.3d at 784–85. That standard is met here.

Finding no support for its arguments in *Barnes-Wallace*, Glendale next attempts a sleight of hand. Glendale argues that foreign affairs preemption cases do not support Plaintiffs' standing here because such cases tend to arise when plaintiffs challenge personal economic harm or criminal sanctions. GAB 22–23. It matters not what the injury alleged in those foreign affairs preemption cases was; what matters is whether the Plaintiffs here have alleged injury-in-fact. Under *Barnes-Wallace*, they have. What Glendale is asking this Court to do is to mix the standing and merits inquiries. Yet, this Court has been clear that "[w]hether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits." *Tyler v. Cuomo*, 236 F.3d 1124, 1133 (9th Cir. 2000) (citation omitted).

Because Glendale's position is flatly inconsistent with *Barnes-Wallace*, Glendale tries to distinguish that decision on two grounds. First, it argues that *Barnes-Wallace* is predicated on the Boy Scouts' "control" and "dominion" of the public land. GAB 24. To be clear, the *Barnes-Wallace* plaintiffs had never applied to, or been excluded from, use of the land by the Boy Scouts. 530 F.3d at 782. It was sufficient that the plaintiffs "would be confronted with symbols of the Boy Scouts' belief system if they used or attempted to gain access to Balboa Park

and the Aquatic Center." *Id*. at 784. Glendale's reliance on the concurring views of one judge (GAB 24) cannot change what a panel of this Court actually held.

Next, Glendale argues that *Barnes-Wallace* only applies in Establishment Clause cases. GAB 26. Glendale is wrong. The *Barnes-Wallace* plaintiffs advanced numerous claims *not premised* on the Establishment Clause, 530 F.3d at 783, and the Court's analysis relied on far more than Establishment Clause cases for authority in finding standing. *Id*. at 784–85. Had the standing analysis been limited only to Establishment Clause cases, which would be a holding in tension with Supreme Court precedent, *see Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 488 (1982),[3] the panel would have said so.

Glendale's reliance on *Valley Forge* (GAB 25), a decision that long predated *Barnes-Wallace*, does not dictate a contrary result. In contrast to the *Valley Forge* plaintiffs, Maryland and Virginia residents who challenged conduct in Pennsylvania, Plaintiffs here hardly "roam the country in search of governmental wrongdoing." *Valley Forge*, 454 U.S. at 487; *Barnes-Wallace*, 530 F.3d at 785.

[3] Indeed, the Supreme Court has applied the same standing analysis from Establishment Clause cases in other contexts. *See, e.g., Allen v. Wright*, 468 U.S. 737, 750–51, 754 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377 (2014) (applying *Valley Forge* when evaluating standing for declaratory and injunctive relief for racial discrimination and equal protection violations, among others). This confirms that standing does not turn on a "spiritual stake," GAB 26, it turns on whether there is injury-in-fact under governing law.

Plaintiffs live in Glendale and neighboring cities within Los Angeles County and expressed an intent to use the Glendale park and its facilities. Glendale is, in any event, wrong in its reading of *Valley Forge*. GAB 25, 27. Counter to Glendale's reading, the *Valley Forge* majority explained: "[W]e do not retreat from our earlier holdings that standing may be predicated on noneconomic injury." *Id.* at 486. *Valley Forge* thus did not hold that the plaintiffs lacked standing because their injury was psychological, but rather because they had not "alleged an injury of any kind, economic or otherwise, sufficient to confer standing." *Id.* (italics omitted).

Here, in contrast, plaintiffs do allege an interest in using the land at issue and injury due to the loss of such use. ER 54–56, 66. It is disingenuous, at best, for Glendale to suggest that Plaintiffs are looking to the federal courts as "college debating forums" to voice their value preferences. GAB 25. As members of the group of people castigated by Glendale, Plaintiffs look to the federal courts to remedy Glendale's violation of the Constitution's careful allocation of foreign affairs powers.

Caldwell v. Caldwell, 545 F.3d 1126 (9th Cir. 2008), also cited by Glendale (GAB 25), likewise fails to support Glendale's argument. The *Caldwell* plaintiff lacked standing to raise an Establishment Clause claim arising from a discussion of religious views on a University of California website not because the asserted

injury was offended feelings, but because the plaintiff was not sufficiently related to the conduct alleged (*i.e.*, not the parent of a child directly exposed to unwelcome religious classroom conduct). *Id.* at 1132–33; *see also* AOB 32–34.

Next, Glendale misapprehends (GAB 27–29) the import of the environmental cases cited in Appellants' Opening Brief. Just as this Court in *Barnes-Wallace* analogized standing there to environmental cases, so do the Plaintiffs here. AOB 19–20. Glendale is mistakenly under the impression that standing law is hermetically sealed within boxes that require this Court only to look at standing cases for similar claims. Yet, the determination of injury-in-fact is not about such analytical modeling, as *Barnes-Wallace* shows. Here again, Glendale's view of what the law should be is not what a prior panel of this Court has said the law is.

As explained in Appellants' Opening Brief, Plaintiff Gingery had municipal taxpayer standing. AOB 26–28. On account of her death, that argument is now moot. However, subject to leave to amend, Appellants can plead that Plaintiff Mera has municipal taxpayer standing. This Court should grant leave to amend either by remanding the case to the district court or under 28 U.S.C. § 1653, so that Plaintiff Mera may plead such standing with additional facts, if required. *Snell v. Cleveland, Inc.*, 316 F.3d 822, 828 (9th Cir. 2002); *see also* 28 U.S.C. § 1653

("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.").

Given that the individual Plaintiffs clearly have standing to sue in this case, the Court need not reach the issue of GAHT-US's organizational standing. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). Nonetheless, GAHT-US does have standing because Plaintiff Mera and its members have standing and for the reasons explained in Appellants' Opening Brief (at 28–30). Furthermore, the interests at stake in this lawsuit—the local, global, and political implications of Glendale's interference in foreign relations between the United States, Korea, and Japan—are completely germane to the organizational purpose of GAHT-US, which is to provide educational resources "concerning the history of World War II and related events, with an emphasis on Japan's role," and to "enhance a mutual historical and cultural understanding between and among the Japanese and American people." ER 55, ¶7.

This Court should find standing and reach the merits.

II. GLENDALE'S INSTALLATION OF THE MONUMENT AND PLAQUE IS PREEMPTED BY THE FEDERAL GOVERNMENT'S EXCLUSIVE AUTHORITY TO REGULATE FOREIGN AFFAIRS

The central issue in this case is whether Glendale has overstepped the carefully crafted constitutional limitations on state and municipal sovereignty to speak on matters relating to foreign affairs. It has: Glendale's action intrudes on

the foreign affairs power vested *exclusively* in the federal government. AOB 40–58. Because Glendale has neither law nor logic on its side, it attempts to create out of thin air a complete defense to Plaintiffs' foreign affairs preemption claim. Its argument is that nonregulatory, expressive municipal conduct cannot be subject to foreign affairs preemption. GAB 34. Glendale's theory should not be accepted by this Court.

A. Federal Courts May Grant Injunctive Relief Against Municipalities That Intrude Upon the Federal Government's Exclusive Powers Over Foreign Affairs, Even When Expressive Conduct Is Involved

Glendale argues that "there is no authority for subjecting nonregulatory, expressive municipal conduct to a foreign affairs preemption analysis" because such "jurisprudence is concerned with regulatory and coercive, as opposed to expressive, state conduct." GAB 34. Yet, Glendale cites no case to support this baseless argument, and, to be clear, no such case exists. No case exists because foreign affairs preemption is concerned not with the type of conduct at issue, but with the question whether state or municipal activity *violates the Constitution*. *See, e.g.*, *Garamendi*, 539 U.S. at 413–14. It matters not whether a state or municipality passes a law or regulation that infringes on foreign affairs or, as here, installs a monument and plaque that interferes with foreign affairs. This is so because state or municipal action no matter the kind is not permitted to "distort[] the allocation of responsibility to the national government for the conduct of American diplomacy." *In*

re World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1168 (N.D. Cal. 2001) (internal quotations and citation omitted), *aff'd on other grounds sub. nom. Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003).

Glendale next makes the staggering claim that "expressive municipal conduct touching on foreign affairs" is not subject to a foreign affairs preemption suit because "[s]uch a rule would be inconsistent with municipalities' historical expression to the public." GAB 34, 39. Its argument, supported (if at all) by one very broad statement from an inapposite Ninth Circuit, is that Glendale effectively has carte blanche to say whatever it wishes concerning "'a wide range of matters of public affairs [such as] foreign policy'" regardless of whether its conduct violates the Constitution. GAB 2, 33 (quoting *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996)). Case law is to the contrary.

To begin with the *Alameda Newspapers* court's doctrinal reasoning is inapposite because it was addressing statutory preemption under the National Labor Relations Act, 95 F.3d at 1412, which is concerned with congressional intent, and not foreign affairs preemption, which is concerned with the Constitutional allocation of powers between the federal government and the states. Even it if were on point, the key to *Alameda Newspapers*'s holding was that "[n]one of the City's actions at issue here . . . serves to coerce any party, or may be fairly said to 'interfere' with the [bargaining] process." *Id*. at 1418. That is clearly

not the case here, as Glendale is plainly trying to coerce Japan and interfere with foreign affairs. Finally, this Court there assumed that "under some circumstances speech by a governmental agency might attain coercive power," and thus be subject to preemption. *Id*. at 1414. This is fully consistent with Plaintiffs' arguments.

Even if local governments have the right to express themselves,[4] they have no right to speak in such a manner as to interfere with foreign affairs. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 (1st Cir. 1999) (Nothing "suggests that a state government's First Amendment interests, if any, should weigh into a consideration of whether a state has impermissibly interfered with the federal government's foreign affairs power."). Otherwise, federal policy would be entirely compromised.

[4] Plaintiffs submit that municipal governments do not have First Amendment rights under federal law. *See, e.g.*, *Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the [g]overnment."); *Nat'l Foreign Trade*, 181 F.3d at 61 ("a state entity itself has no First Amendment rights") (citations omitted); *Warner Cable Cmmc'ns, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) (holding that a government speaker is not protected by the First Amendment); *see also Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (government right to speak cannot be equated for all purposes to speech by an individual). As far as Plaintiffs are aware, there are no published cases squarely holding that California municipalities have First Amendment rights to speak on matters of foreign affairs. Therefore, Glendale has no protected right to speak.

Glendale seems to think that labelling something as "nonregulatory, expressive conduct" makes a difference for purposes of the Constitution. GAB 37. Yet, just because a government may have some speech rights, "[t]his does not mean that there are no restraints on government speech . . . . For example, government speech must comport with the Establishment Clause," and "advocacy may be limited by law, regulation, or practice." *Pleasant Grove*, 555 U.S. at 468–69. "[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions." *Id.* at 482 (Stevens, J., concurring). Thus, "recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages. *Id.* (Stevens, J., concurring). Similarly, "government speech must comport with the Establishment Clause." *Id.* at 468 (majority opinion). And unlike private individuals, government entities are not permitted to pick and choose any message they wish to impart if it violates other constitutional commands. *Id*. at 486–87 (Souter, J., concurring). Government speech is also limited by the Equal Protection Clause. *Id.* at 482 (Stevens, J., concurring).

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 or municipality "may violate the constitution by 'establish[ing] its own foreign policy."' *Deutsch*, 324, F.3d at 709 (quoting *Zschernig v. Miller*, 389 U.S. 429, 441 (1968)). The Constitution requires that "the field affecting foreign relations be left entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). Glendale thus misstates governing law when it says that expressive conduct cannot be preempted. GAB 34.

To be sure, none of the cases relied on by Plaintiffs involved foreign affairs preemption challenges to municipal conduct such as this. But, that just goes to show how extreme Glendale's conduct actually is. Municipalities are not generally in the business of castigating foreign nations that are allies of the United States, and thus plaintiffs do not generally need to vindicate their rights by filing such cases in federal court. Lest there be any doubt as to what Glendale was trying to accomplish, then-Councilmember Sinanyan made clear that Glendale intended to insert itself into foreign affairs, even though such activity conflicted with this Court's decision in *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012). According to him, this Court's case law was not to be followed because the Comfort Women question is "a moral issue; it's a state issue." GAB 37. But, regardless of Glendale's moral conviction, this is not a state issue; this is an exclusively federal issue. This suit, which seeks relief against a municipality for the installation of a monument and plaque preempted by the Constitution's foreign

affairs power, fits comfortably within the foreign affairs preemption doctrine. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

Furthermore, while this Court has not "offer[ed] an opinion" (and thus left open the question) whether there are circumstances where foreign affairs preemption would be appropriate in a case where California "express[ed] support for Armenians by, for example, declaring a commemorative day," *Movsesian*, 670 F.3d at 1077 & n.5, logic compels the conclusion that there must be at least some limits. Plaintiffs respectfully suggest that a line should be drawn between mere expression (the hypothetical noted in *Movsesian*) and foreign affairs advocacy (of the sort undertaken here by Glendale). Indeed, as this Court recognized in *Alameda Newspapers* (the key case cited by Glendale in support of its activities), once the line is crossed to coercion and interference there may be preemption. 95 F.3d at 1418. Since a state or municipality "may violate the constitution by 'establish[ing] its own foreign policy,"' *Deutsch*, 324 F.3d at 709, the test is whether Glendale has established its own foreign policy by castigating Japan, convicting Japan of war crimes, and urging Japan to accept historical responsibility for these crimes. Glendale's conduct is preempted because it does more than commemorate; it advocates (through coercion and interference) that Japan take actions and thus intrudes upon the federal government's exclusive authority to regulate foreign affairs.

In an attempt to circumvent this basic principle, Glendale points to the long tradition of state officials issuing proclamations on many subjects. GAB 40. Yet, 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." *Pleasant Grove*, 555 U.S. at 479. Such a monument is not a transient and hortatory statement; it is a 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)), a form of preemption of state action by federal constitutional law.

Finally, because its paean to unregulated municipal foreign affairs speech cannot carry the day, Glendale appeals to the slippery slope. GAB 39–40. Glendale argues that allowing a foreign affairs preemption claim to proceed on the facts of this case threatens a host of historical discussions, including school curriculum and textbooks and will "chill local governments from commenting on matters of public interest." GAB 40, 42. The best argument Glendale can offer up (referencing the court below) is that if Plaintiffs state a claim for relief here then a

municipality would fear making a commemorative proclamation regarding the horrors of the Holocaust. GAB 41. As Appellants showed in their Opening Brief (AOB 57), this argument is misplaced. Glendale's taking of a disputed position on a matter of historical debate, criticizing a foreign ally for its conduct during World War II, and urging that ally to go take actions beyond which it has previously determined are obviously different than commemorating those harmed by the Holocaust. While Glendale has little faith in the ability of courts to craft remedies for constitutional violations, Plaintiffs have full faith that courts are able to discern claims based on advocacy and coercion that interfere with foreign affairs from mere commemoration.

B. Glendale's Actions Are Subject To Field Preemption

Glendale's argument that, to establish preemption, "Plaintiffs must allege a conflict with federal law to establish foreign affairs preemption" (GAB 43) is plainly wrong. A municipality cannot act within a traditional area of municipal authority when it engages in activity, such as foreign affairs, reserved exclusively for the federal government. Glendale has acted beyond any area of traditional municipal authority by injecting itself into foreign affairs and seeking to establish foreign policy. AOB 54. Glendale can point to no "long tradition" of municipal governments demanding foreign allies to make amends for alleged historical wrongs because no such tradition exists.

The only long tradition, therefore, is the long-standing recognition of the primacy of the federal government in the area of foreign policy is rooted in the "'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power in the first place." *Garamendi*, 539 U.S. at 413 (citation omitted); *see also* The Federalist No. 42, at 279 (James Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."). As this Court has noted, "[t]o participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy." *Int'l Ass'n. of Machinists & Aerospace Workers, (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354, 1358 (9th Cir. 1981). Accordingly, "where foreign affairs is at issue, the practical need for the United States to speak with one voice and ac[t] as one, is particularly important." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1438 (2012) (citation and internal quotes omitted). 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.").

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. But there can be no doubt that Glendale's conduct had such an effect. Reactions from the highest ranks of the Japanese government— including the Prime Minister, the Chief Cabinet Secretary, and Japan's Ambassador to the United States—are detailed in Plaintiffs' complaint. ER 63–64, ¶¶36–42. None of those reactions are disputed (nor can they be) by Glendale.

Lest there be any doubt that there has been a direct impact on foreign affairs, Chief Cabinet Secretary Yoshihide Suga in a press conference on February 25, 2015 explained that "the establishment of comfort women statues and memorials in the United States runs entirely counter to the position of the Japanese Government and our efforts thus far, and is deeply regrettable. . . . In this context, we believe it is inappropriate for private organizations to bring into civic life matters such as the comfort women issue on which people have entirely different views depending on their country of origin." Prime Minister of Japan and His Cabinet, *Press Conference by the Chief Cabinet Secretary* (February 25, 2015), *available at* http://japan.kantei.go.jp/tyoukanpress/201502/25_a.html

Contrary to Glendale's assertion that the monument and plaque are fully consistent with U.S. policy (GAB 49), the position of the United States is consistent with Secretary Suga's statement and not with Glendale's advocacy. Ambassador Caroline Kennedy stated on April 12, 2015 that regarding the "Comfort Women" issue the United States' "interest is *to encourage the countries to work together* and resolve those differences." *60 Minutes* (CBS television broadcast April 12, 2015), *available at* http://www.cbsnews.com/videos/the-attack-on-sony-ambassador-kennedy-rush-to-judgment/ (emphasis added).

Given the great diplomatic sensitivity of this issue in both nations, there can be no doubt that statements on this subject have important foreign relations implications. For that reason, such statements may be made only by the federal government, particularly the Executive branch. Local government action that addresses matters of international concern carries "great potential for disruption or embarrassment" of U.S. foreign policy, *Zschernig*, 389 U.S. at 435; any adverse reaction by foreign governments to such a state action "of necessity would be directed at American [interests] in general, not just that of the . . . State, so that the Nation as a whole would suffer." *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 450 (1979). "This would be disastrous, not only because of multiplicity and divergence of policies, but because local decisions are often influenced by pragmatic local considerations which are not necessarily controlling or even

relevant to national policy as determined by the Federal Government at Washington." *New York Times Co. v. City of New York Commission on Human Rights*, 41 N.Y.2d 345, 353 (1977).

There is an obvious danger that governmental pronouncements on foreign affairs made by multiple state and local bodies could present a confusing picture of U.S. policy, which is compounded by the danger that foreign governments will not have a clear sense of the division of governmental responsibility under the U.S. federal system. If Glendale may assert a role in foreign affairs, so too may the fifty States and the tens of thousands of other cities and municipalities in our Nation. The resulting multiple statements of views would be the very antithesis of the federal Executive's authority to speak with one voice on matters of foreign affairs, and therefore is prohibited by the Constitution.

Finally, it matters not that Glendale established a monument and plaque allegedly based on a legally nonoperative resolution of one house of Congress. GAB 48–50. As Appellants have already explained, whether state action is in accord with the actions of some federal officials is irrelevant to the analysis. AOB 53–54. What matters is that the federal government be permitted to speak with one voice without the voice of a small California municipality intruding on its exclusive authority. To date, the federal government has urged Japan and its neighbors to work together to

solve the issues related to Comfort Women. ER 64–65, ¶¶46–48. It has in no way deputized Glendale to police the Japanese Government.

III. THE DISTRICT COURT ERRED IN REFUSING TO GRANT LEAVE TO AMEND—EVEN A SINGLE TIME

Finally, the district court erred because it did not permit leave to amend. AOB 15–17. Given that the standard for futility is exceedingly high and that Plaintiffs have presented ample allegations and authority to support standing and the merits, leave to amend is warranted, if necessary. For example, Plaintiffs could have easily amended the Complaint in at least two additional and distinct ways. First, based on Glendale's reprimand of Japan and Japanese-Americans, Plaintiffs could have alleged an Equal Protection violation. *See, e.g.*, *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). Second, Plaintiffs could have amended to include facts concerning the stigma they face as Japanese-Americans because of the monument's message. *See, e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (finding standing because discrimination that "stigmatiz[es] members of the disfavored group . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group."); *Smith v. City of Cleveland Heights*, 760 F.2d 720, 722 (6th

Cir. 1985) (finding stigma to be sufficient injury for standing purposes). At a minimum, leave to amend should be granted so that Plaintiff Mera may allege municipal taxpayer standing. As a result, the district court erred by denying Plaintiffs leave to amend even once.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that the judgment of the district court be reversed and the case remanded for further proceedings.

Dated: May 27, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, and Ninth Circuit Rule 32-1, Plaintiffs-Appellants hereby certify that this Opening Brief is proportionately spaced, has a typeface of 14-point and contains 6,956 words.

Dated: May 27, 2015 Respectfully submitted,

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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 27, 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.

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