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

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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

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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