CASE NO. 14-56440

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHIKO SHIOTA GINGERY, KOICHI MERA,
GAHT-US CORPORATION,
Plaintiffs-Appellants,
v.
CITY OF GLENDALE, a municipal corporation, SCOTT OCHOA, in his capacity
as Glendale City Manager,
Defendants-Appellees.

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

**MOTION OF THE KOREAN AMERICAN FORUM OF CALIFORNIA
FOR LEAVE TO FILE AMICUS CURIAE
BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES**

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MOTION FOR LEAVE TO FILE AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29, the Korean American Forum of California (KAFC) hereby respectfully requests leave to file the concurrently submitted amicus curiae brief in support of Defendants and Appellees City of Glendale, a municipal corporation, and Scott Ochoa, in his capacity as Glendale City Manager (hereinafter, collectively, Glendale or the City). KAFC has an interest in the analysis of foreign affairs preemption as it concerns the placement of monuments in parks because KAFC is actively involved in raising money for and advocating for such memorials. KAFC is concerned that plaintiff's challenge to the monument and a lawsuit against the City of Glendale is designed to deter other cities from honoring and commemorating the the history of 'Comfort Women'. Moreover, this lawsuit has implications for other survivors of human rights abuses and their advocates. KAFC has an interest in ensuring that local political action in support of survivors of human rights abuses is not artificially curtailed by an overly broad reading of the foreign affairs doctrine.

KAFC endeavored to obtain the consent of all parties to the filing of the brief before filing this motion. The City of Glendale has consented to the

filing of KAFC's brief. Plaintiffs-Appellants (hereinafter Plaintiffs) have declined to consent to the filing of the brief; consequently, KAFC is filing this motion.

KAFC was formed by a group of California residents who joined a national grassroots movement to promote the historic House Resolution 121, aka 'Comfort Women Resolution', which unanimously passed on July 30, 2007. KAFC has an interest in preserving the memorial statue in Glendale because it raised donations for the memorial. Its members provided funds so that the memorial could be built.

KAFC is focused on raising public awareness of the comfort women, which it hopes will play a part in putting an end to war crimes against women and children. KAFC seeks to build monuments honoring women who were sexually enslaved during World War II, in an effort to ensure that, in the words of the plaque on the memorial, such "unconscionable violations of human rights shall never recur." KAFC spent a great deal of time and effort, as well as its members' money, advocating and raising money for the memorial challenged in this case. *Gingery v. City of Glendale*, No. 2:14-cv-01291-PA-AJW, Dkt. 45, at 2: 16-17. In addition, KAFC has exerted a great deal of time and effort assisting survivors to visit the U.S. to raise

awareness, and were instrumental in assuring that survivors be present at the dedication of the memorial.

Furthermore, the members of KAFC were involved in arranging for survivors to testify before Congress during the passage of House Resolution 121. KAFC is dismayed that Plaintiffs have characterized the House of Representatives as powerless to affect foreign policy through their statements. Given KAFC's participation in the House Resolution 121 proceedings, KAFC has an interest in ensuring that the Resolutions made by the House of Representatives, a democratically elected government entity, continue to be recognized as federal foreign policy. Moreover, it also has an interest in ensuring that state and local governments can continue to promulgate messages that refer to and reflect this House Resolution.

KAFC's proposed brief amicus curiae, attached to this motion, contains considerable material relevant to the issues presented by this case that will be helpful to the Court. To the court. In particular, it discusses the scope of foreign affairs preemption of traditional state actions such as the placement of monuments, and the effect of a Congressional statement of foreign policy on foreign affairs preemption. It sets forth current tests on conflict preemption and field preemption, and the traditional state competence concerning expressive conduct and maintenance of parks.

KAFC believes that its participation in the action as amicus curiae will be helpful to the Court in deciding the case. KAFC's proposed amicus brief generally opposes Plaintiff's contention that Glendale's actions were not within the traditional competence of state government, and, therefore, invalidates Plaintiffs' assertion that field preemption applies.

CONCLUSION

For the reasons stated in this Motion, KAFC respectfully requests that this Court grant its motion to file the accompanying amicus brief in support of Defendants-Appellees.

Dated: May 20, 2015 Respectfully submitted,

By: /s/ Catherine Sweetser
Catherine Sweetser
Attorneys for Plaintiffs-Appellants

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, 29(c)(1), Proposed Amicus Curiae the Korean American Forum of California hereby certifies that it is a California non-profit organization with tax-exempt status under both California law and I.R.C. §501(c)(3). The Korean American Forum of California does not issue stock, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

STATEMENT OF COMPLIANCE

No counsel for any party authored this brief in whole or in part. Neither any party nor any counsel for any party contributed any money that was intended to fund preparing or submitting the brief. No person—other than Amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF AMICUS

The Korean American Forum of California (KAFC) has an interest in this action. KAFC is a non-profit organization that seeks to raise public awareness of the "comfort women" and to build memorials honoring victims of sexual slavery in order that such "unconscionable violations of human rights shall never recur." ER 58, ¶11. KAFC spent a great deal of time and effort, as well as its members' money, advocating and raising money for the memorial challenged in this case. *Gingery v. City of Glendale*, No. 2:14-cv-01291-PA-AJW, Dkt. 45, at 2: 16-17. Applicant also spent time and effort working with survivors to visit the United States to raise awareness, including a visit to Glendale at the time of the dedication of the memorial. *Id*. KAFC is concerned that plaintiff's challenge to the monument and a lawsuit against the City of Glendale is designed to deter other cities from remembering and commemorating the history of 'Comfort Women'. KAFC has an interest in protecting the rights of local governments to install monuments such as this one that honor victims of human rights abuses.

Members of KAFC were also involved in arranging for survivors to testify before Congress during the passage of House Resolution 121. The Korean American Forum notes with concern that Plaintiffs dismiss the ability of Congress to set federal foreign policy and argue that such resolutions are meaningless.

KAFC has an interest in ensuring that such resolutions of Congress are recognized as foreign policy, and that the ability of constituents to petition their representatives on such matters is not indirectly curtailed by the courts. KAFC has filed an accompanying motion for leave to file this brief.

INTRODUCTION

The district court correctly found that Plaintiffs failed to state a claim for relief because they could not allege facts showing a "clear conflict" between the placement of the monument and federal foreign policy. The view espoused by Plaintiffs, that field preemption bars state and local governments from issuing any statements that touch on foreign affairs whether or not they conflict with federal policy, would vastly limit local democratic processes and the ability of constituents to speak about or recognize facts about events in other countries.

The memorial is not tantamount to disapproval of the Japanese nation or people, any more than a Holocaust memorial is tantamount to disapproval of the German nation or people. Rather, this memorial expresses sorrow that these acts occurred, esteem for the survivors, and a firm commitment that such atrocities should never recur. See Complaint ¶11. Such memorials and monuments are within the traditional competence of local municipalities and state governments. Local officials have the right to expressive conduct on matters of concern to their constituents.

The complaint itself recognizes that the monument installed by the City of Glendale expressly references and is in commemoration of a federal statement of foreign policy, House Resolution 121, passed on June 30, 2007. ER 58. The complaint fails to present any conflicting statement by the federal government. The complaint thus fails to state a claim.

STATEMENT OF FACTS

A. The City of Glendale Created a Memorial to Honor Survivors of Atrocities in World War II and to Commemorate the Passage of a House Resolution That Condemned those Atrocities.

Glendale approved and installed the monument in this case in 2013 in memory of survivors of sexual slavery during World War II and to express "sincere hope that these unconscionable violations of human rights never recur." ER 57 (Complaint ¶11). The monument consists of a "statue of a young girl in Korean dress sitting next to an empty chair with a bird perched on her shoulder." ER 57. The plaque next to the statue discusses the symbolism of the statue and declares it to be "In memory of more than 200,000 Asian and Dutch women who were . . . coerced into sexual slavery by the Imperial Armed Forces of Japan between 1932 and 1945." ER 58 (¶ 11). The plaque also explicitly states that it is "in celebration . . . of passing of House Resolution 121 by the United States Congress on July 30, 2007, urging the Japanese government to accept historical responsibility for these crimes." ER 58 (¶ 11).

House Resolution 121 was passed with bipartisan support on June 30, 2007. H.R. 121, 110th Congress (2007), *available at* https://www.congress.gov/bill/110th-congress/house-resolution/121/text. Congress first held hearings at which three survivors testified: Ms. Yong Soo Lee, Ms. Jan Ruff O'Herne, and Ms. Koon-Ja Kim. HR 8872, 160 Cong Rec E 269 (2014) (Statement by Rep. Mike Honda); World War II Sex Slaves Testify Against Japan Before Congress, USA Today (February 15, 2007), *available at* http://usatoday30.usatoday.com/news/washington/2007-02-15-japan-comfort-women_x.htm. Congress made a number of factual findings in the resolution. H.R. Res. 121, 110th Congress (2007). The House of Representatives found that the government of Japan "officially commissioned the acquisition of young women for the sole purpose of sexual servitude to its Imperial Armed Forces," a system of forced prostitution "unprecedented in its cruelty and magnitude." *Id.* It further found that there was a backlash against former official statements and apologies, both in new textbooks and in a movement by some Japanese public and private officials. *Id.* The House also found that the government of Japan had initiated and funded a private foundation "with the aim of atonement for the maltreatment and suffering of the 'comfort women.'" *Id.*

Congress explicitly called on Japan to take four steps regarding the atrocities committed during World War II: 1) a formal apology by the Japanese government;

2) that the Prime Minister make such an apology publicly in his official capacity; 3) that the government of Japan publicly refute the assertions that trafficking and slavery never occurred; and 4) that the government of Japan educate future generations about these war crimes. *Id.* The language on the monument thus largely echoes the words of House Resolution 121, which also requested and advocated for the Japanese government to accept responsibility for these crimes.

B. The Expressive Statements on the Plaque at the Memorial Are Supported by the Sworn Testimony of Survivors and by Statements of the United States Government.

There is no serious factual question as to whether these atrocities occurred. The Japanese government has acknowledged the historical truth of these events. Ans. Br. 7 (citing *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); Ministry of Foreign Affairs of Japan, Statement by the Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of "Comfort Women," *available at* http://www.mofa.go.jp/policy/women/fund/state9308.html. In 1993, Chief Cabinet Secretary Yohei Kono specifically acknowledged that the "then Japanese military

was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women . . . against their will."

In addition, the statements on the monument are supported by sworn declarations from survivors of sexual slavery. *See Gingery v. City of Glendale*, No. 2:14-cv-01291-PA-AJW, Dkt. 45. These declarations were sworn under penalty of perjury and explained the atrocities that had befallen the so-called "comfort women" during World War II.

One of the women, Il-Chul Kang, was fourteen at the time that she was kidnapped in 1944. Dkt. 45-1,¶ 3. Agents of the Japanese government, including a police officer, took her from her home in Korea and sent her to China. *Id*. ¶¶ 10-12, 22. In her declaration, she described how Japanese guards watched her and the other kidnapped girls constantly on the train and beat her when she cried. *Id*. ¶¶ 17, 21. Once she arrived in China, she was kept in a "comfort woman" station located on a military base; one of the administrators was a soldier who worked for the Japanese military. *Id*. ¶¶ 28, 35, 47. Although she had not yet gone through puberty, she was raped by multiple soldiers and officers of the Japanese military. Ms. Kang was punched and kicked and suffered multiple broken bones when she resisted. She and the other girls were kept in an unheated station. Her genitals became swollen and infected from the multiple rapes. Ms. Kang ultimately contracted Typhoid fever, and the soldiers took her to a remote location to kill her.

Some villagers near that location intervened and saved her, hiding her in a small house in the mountains.

The other woman who submitted a declaration, Ok-Seon Lee, was kidnapped in 1942 from Ulsan, Korea. *Id*. ¶¶ 2, 4. She was transported by train to a Japanese air force base in Yanji, China. *Id*. ¶¶ 6, 10. At first, she was assigned to work as a laborer on a runway expansion at the base. *Id*. ¶ 10. However, she kept protesting and confronting her captors at the base, demanding that she be allowed to return home. *Id*. ¶ 12. One day, the soldiers from the base entered the room where Ms. Lee and other girls stayed and raped all the girls. *Id*. ¶¶ 14-17. Ms. Lee was then sent to a house with a sign labeling it as a "Comfort Station" in the city of Yanji. *Id*. ¶ 18. About ten girls were held there. *Id*. ¶ 18. Ms. Lee testified that "From that day on, the soldiers came every day and raped us." *Id*. ¶ 22. On average, she was forced to have sex with ten to twenty-five soldiers per day; some girls were forced to service up to forty men on the same day. *Id*. ¶ 29. The administrators kept track of the numbers with tickets. *Id*. ¶ 30.

Although the administrators of the house where Ms. Lee was held were civilians, the military was ultimately responsible for its operation. The civilian administrators were able to call on the military police to beat the captive girls. *Id.* ¶ 32. Japanese military doctors made visits to the comfort house once a week to perform STD tests. *Id.* ¶ 23. When Ms. Lee became ill with syphilis, she was sent

to a military hospital. *Id.* ¶ 31. The military doctor treated her with mercury, which cured her syphilis but also made her infertile. She also endured beatings at the hands of the soldiers. *Id.* ¶ 25, 28. When she once attempted escape, the soldiers caught her at her hiding place in the mountains, and she was "almost beaten to death." *Id.* ¶ 28. She was beaten so badly that it caused vision and hearing problems and loosened her teeth. *Id.* While she was at the "comfort station", she was "always hungry and cold," and she "witnessed many girls die of hunger and disease." *Id.* ¶ 27.

The facts demonstrate that serious atrocities were perpetrated by members of the Japanese military against women and girls during World War II. There was an official policy of the creation of "comfort stations" in areas of Japanese occupation. The statue installed by Glendale reflects these facts.

C. The District Court Dismissed the Case for Lack of Standing and Failure to State a Claim

The district court dismissed the case on two grounds: first, on the ground that Plaintiffs lacked standing, and second, on the failure of the complaint to allege facts that state a cognizable legal theory. ER 24–25. The district court found that Plaintiffs could not present "evidence of clear conflict" as required by *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003). The district court concluded that holding for Plaintiffs "would invite unwarranted judicial involvement in the

myriad symbolic displays and public policy issues that have some tangential relationship to foreign affairs." ER 25. The logical extension of such a ruling is that "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." *Id.* The district court thus dismissed Plaintiffs' action with prejudice.

ARGUMENT

Foreign affairs field preemption does not apply to expressive conduct by local governments, as the establishment of monuments in parks is an area of traditional state responsibility. Plaintiffs admit that conflict preemption applies to areas of "traditional state responsibility." Op. Br. at 43. They do *not* contest the district court's finding that they cannot present a "clear conflict" under the conflict preemption standard. Op. Br. at 40-58. Instead, they consistently argue that the statements must be barred by a broad doctrine of field preemption. *Id.* By not making any argument that there is a conflict with federal policy in their opening brief, Plaintiffs have waived any claim that they can meet the conflict preemption standard. *Koerner v. Grigas*, 328 F.3d 1039, 1048-49 (9th Cir. 2003).

Field preemption does not apply to claims based on expressive conduct. Statements by federal and local governments expressing the concerns of their constituents are well within their traditional authority. Monuments, memorials,

sculptures, and installation of symbolic gifts from other countries have long been part of the American landscape. The simple fact that such opinions may concern events occurring abroad or foreign governments does not mean that the Constitution forbids such speech.

Moreover, Plaintiffs have waived their argument that they could meet a conflict preemption standard. There is no conflict with federal foreign policy here, as the statue reiterates and reasserts sentiments found in House Resolution 121. This resolution is sufficient evidence of federal foreign policy for the court to find that there is no conflict.

Finally, even if the installation of a monument were not within the traditional competence of the state, which it is, field preemption analysis does not apply to *every* case where there are potential implications for foreign policy. Past Ninth Circuit cases make clear that only *core* foreign affairs powers fall within the field of the federal government's exclusive jurisdiction. Installation of monuments in local parks is not within that core foreign affairs authority.

I. Field Preemption Does Not Apply to Areas of Traditional State and Local Jurisdiction and Competence Such As Expressive Conduct by Local Governments

Field preemption only arises when a state government specifically intends a law to affect foreign affairs and is regulating outside its traditional competence.

Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1073 (9th Cir. 2012). The Ninth Circuit has never applied field preemption to expressive conduct by governments. In fact, the Ninth Circuit in *Movsesian* specifically stated that it did not hold that "expressive conduct" by a state or local government would give rise to foreign affairs preemption. *Id*. at 1077 & n.5. To declare that any expressive conduct is preempted when it touches on foreign affairs would vastly extend the field preemption doctrine beyond what the Ninth Circuit has held in the past. It would impinge upon the traditional right of local governments to express the opinions of their constituents.

A. Glendale's Placement of a Monument in Its Park Is Within Its Traditional Competence.

In conjunction with the traditional local government competence over the operation of parks, the city is also entitled to exercise free speech. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). "A government entity has the right to 'speak for itself.' '[I]t is entitled to say what is wishes,' and to select the views that it wants to express." *Id.* (citations omitted). Permanent monuments displayed on public property are a means of exercising this government speech. *Id.* at 470. "Governments have long used monuments to speak to the public." *Id.* This is a tradition that, according to the Supreme Court, harkens back to ancient times. *Id.* Moreover, the *Pleasant Grove* Court concluded "Neither the Court of Appeals nor respondent disputes the obvious proposition that a monument

that is commissioned and financed by a government body for placement on public land constitutes government speech." *Id.* Placing monuments on government land thus falls well within the traditional realm of local government regulation.

The City of Glendale used democratic processes to decide that they would create a memorial to honor victims and survivors of human rights abuses. As Plaintiffs acknowledge, they were able to participate in that process and express their views at City Council meetings. Op. Br. at 33. Plaintiffs also acknowledge that the memorial explicitly references and echoes a federal statement of foreign policy, House Resolution 121, passed on June 30, 2007. Op. Br. at 53.

As the Ninth Circuit stated in *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 and immigration. We are not aware of any case in which a court has ever held that a local government is preempted by federal law from making such statements or adopting such proclamations.

Expressive conduct such as the creation of a monument or a plaque clearly falls within the realm of traditional state and local government competence. As the court found in Alameda, barring local governments from speaking about matters of concern to their communities is "antithetical to fundamental principles of federalism and democracy." *Id.* at 1415.

Cities often place monuments and public artwork in public parks and on public thoroughfares. For example, Bicknell Park in Montebello is home to a memorial to the victims of the Armenian Genocide. Memorial, http://www.armenian-genocide.org/Memorial.118/current_category.75/offset.10/memorials_detail.html, accessed May 13, 2015. The City of Los Angeles owns a donated sculpture called the "Friendship Knot" by Shinkichi Tajiri that symbolizes friendship between Los Angeles and Japan. Friendship Knot—Background Information, http://www.publicartinla.com/Downtown/Little_Tokyo/friendship_knot.html, accessed May 13, 2015. Grand Park in Downtown Los Angeles has a plaque and monument dedicated to the memory of "7,000,000 Ukrainians, victims of Russian Communism . . . during 1932-33". Memorial to Ukrainian Victims of Communism, http://www.publicartinla.com/CivicCenter/ukrainians.html, accessed May 13, 2015. San Pedro has a "Korean Bell of Friendship and Bell Pavilion" in Angels Gate Park that was donated by the Republic of Korea. Korean Bell of Friendship and Bell Pavilion, http://www.sanpedro.com/sp_point/korenbel.htm, accessed May 13, 2015. These are just a few of the many monuments in Southern California which arguably touch upon foreign affairs. Given the long history of placing such monuments in parks, there is no doubt that such monuments are an area of traditional state and local government competence. San Pedro's installation

of the Korean Bell of Friendship in its park is not federally preempted by the mere fact of being a gesture of friendship with a foreign government; nor is such placement per se illegal.

Moreover, this lawsuit arises out of Glendale's maintenance and beautification of a public park, which has always been an area of traditional state competence. In *Evans*, the Supreme Court determined that operating a private park triggered the public function exception of the state action doctrine, because operating a park is an action that is traditionally and exclusively in the domain of the states. *Evans v. Newton*, 382 U.S. 296, 302 (1966). The *Evans* Court concluded that "a park . . . traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain." *Id.* In a subsequent case, the Supreme Court reaffirmed that "parks and recreation" is a function typical of those "which governments are created to provide, services such as these which the States have traditionally afforded their citizens." *Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (later overruled on other grounds by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)).

B. Plaintiffs Mischaracterize and Misuse the "Real Purpose" Test, Which Applies Only When a Statute Imposes Disparate Effects on People in Different Locations.

The statements by the City of Glendale are intended to do exactly what they say: remember the women coerced into sexual slavery, celebrate the proclamation

of 'Comfort Women Day' and the passing of House Resolution 121, and express a "sincere hope that these unconscionable violations of human rights shall never recur." ER 58. Plaintiffs argue that the court should set aside the traditional municipal purpose of expressive conduct where that expressive conduct concerns a foreign government in any way, as the "real purpose" of such conduct is interference with foreign affairs. This broad assertion vastly exceeds any "real purpose" test applied by the field preemption cases Plaintiffs cites, *Movsesian, Von Saher*, and *Zschernig*. Those cases concerned situations where a statute that purports to be about a general subject actually is intended to have disparate effects on different classes of people. *Compare Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 619 (9th Cir. 2013) (no preemption of general statute of limitations legislation). The language from *Movsesian* about the "real purpose" of the law is not so broad as to remove a category of political speech from Glendale's traditional competence; in fact, *Movsesian* explicitly declined to rule upon the type of expressive conduct at issue in this case.

Previous cases concerning the "real purpose" test all concern situations where concrete effects differed for specific classes of people *and* the concrete effects occurred outside the borders of the local government. For example, in *Von Saher*, the contested statute allowed claims only "of Holocaust victims and their heirs," and did not "apply to all claims of stolen art, or even all claims of art looted in war. The

statute addresses only the claims of Holocaust victims and their heirs." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010). The court explained that such a provision might be legitimate if it applied only to "regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art," but because it was broader than that and allowed claims against galleries operating anywhere in the world, it was not within the traditional competence of the state. *Id*. at 965. Thus, the court found that a claim that differentiated between classes of claimants based on location, and altered the legal landscape for people worldwide, exceeded the state's traditional competence and could be subject to field preemption. The court explicitly distinguished a hypothetical situation where a statute regulated only art displays within California.

Here, in contrast, the City of Glendale has placed a statue in a local park. Glendale is not discriminating among classes of people or claimants. Glendale is not regulating the placement of statues or the statements of others anywhere outside its own borders. The "real purpose" of the placement of the monument is to display a commemorative artwork in a park within the City of Glendale.

The other two cases of field preemption cited by Defendants have in common with *Von Saher* the regulation of the rights of persons both within and without the state. The Ninth Circuit in *Movsesian*, discussing *Von Saher* at length, similarly

relied on the fact that the statute at issue was "not a neutral law of general application," but applied to grant monetary relief to victims of the Armenian Genocide alone. *Movsesian*, 670 F.3d at 1075. In *Zschernig*, 389 U.S. at 440, the court found that both the intent and the effect of the statute was for local probate courts to grant or deny inheritances based on the type of government controlling the country in which the heir resided. The court found that the true goal of the statute was politicized determinations concerning the operation of the legal system in Communist countries.

In this case it is Plaintiffs' position, not Defendants', that would require courts to make politicized determinations about the behavior of governments. A key factor in *Movsesian* was that the state statute would require the court to conduct "a highly politicized inquiry into the conduct of a foreign nation." *Movsesian*, 670 F.3d at 1076. Similarly, in *Zschernig*, Oregon's probate law was designed to have state courts make "value-laden judgments" about other countries' probate systems and "the credibility of foreign representatives." *Id*. at 1073 (discussing *Zschernig v. Miller,* 389 U.S. 429, 440-41 (1968)).

Here, the City of Glendale has created a memorial to victims of World War II-era atrocities. This memorial does not require further action by the court. It is Plaintiffs' doctrine that requires the court to conduct an inquiry into whether foreign governments do or do not agree with local government statements and what is or is

not controversial. Plaintiffs' broad view of preemption would require courts to make "value-laden judgments" about what local governments are and are not allowed to say.

II. There Is No Conflict With Federal Foreign Policy

The Complaint itself makes patently obvious that there is no conflict with federal foreign policy. Plaintiffs object to a foreign policy position encouraging Japan to "accept historical responsibility for these crimes." Op. Br. at 50. The full language of the plaque reads, "in Celebration of proclamation of 'Comfort Women Day' by the City of Glendale on July 30, 2012, and of the passing of House Resolution 121 by the United States Congress on July 30, 2007, urging the Japanese Government to accept historical responsibility for these crimes." Op. Br. at 3. In other words, the monument celebrates that the federal government is urging Japan to accept historical responsibility. On the face of the complaint, the local government simply repeats the foreign policy position of the federal government. Where, as here, the Complaint itself acknowledges that the local government's commemoration of victims of human rights abuses is in harmony with and echoes a statement of federal foreign policy, Plaintiffs have failed to state a claim.

A. House Resolution 121 Expresses the Foreign Policy Position of the U.S. Government

House Resolution 121 was passed on July 30, 2007, and expressed the view of Congress that Japan 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." H.R. Res. 121. This resolution expresses the United States' policy concerning the recognition of these crimes: an unequivocal declaration that they did in fact occur and a call to Japan to formally recognize that they occurred and to apologize for sexual slavery during World War II. As the Supreme Court recognized in *Garamendi*, Congress too has been given foreign affairs powers by the Constitution. *Garamendi,* 539 U.S. at 429 ("it is worth noting that Congress has done nothing to express disapproval of the President's policy").

Congress made a number of factual findings on which the resolution rested. First, Congress found that the Government of Japan was responsible for ordering the trafficking and sexual slavery of young women by the Imperial Armed Forces during World War II, and that this system of forced prostitution was unprecedented in its cruelty and magnitude, including "gang rape, forced abortions, humiliation, and sexual violence." *Id.* It also found that Japanese Chief Cabinet Secretary Yohei Kono had made a statement acknowledging the crimes in 1993, and that Japanese officials had recently expressed a desire to dilute that statement. In

addition, it found that Japanese textbooks today were downplaying the past commission of war crimes.

House Resolution 121 also expressed Congressional foreign policy in commending Japan for its current efforts to promote human rights and the rights of women, including supporting Security Council Resolution 1325, a resolution by the Security Council urging all actors to protect women from sexual violence in the context of armed conflict. The resolution expressed the opinion of Congress that the "United States-Japan alliance is the cornerstone of United States security interests in Asia and the Pacific and is fundamental to regional stability and prosperity," and that the United States and Japan shared an interest in "support for human rights and democratic institutions." These portions of the resolution make clear that Congress did not see a specific support for an apology by Japan as conflicting with its policy goals of maintaining a cordial relationship with Japan. Rather, it was the opinion of the United States government that their request that Japan formally recognize this atrocity went hand in hand with their strong support of Japan.

The Congressional record consists of representatives delivering multiple statements condemning the atrocities, reproducing the statement by Kono in full, and noting that the statement by Chief Secretary Kono was not officially acknowledged by the Japanese government. HR 8870-8872. The Congressional

committee also heard testimony by three survivors, including Ms. Yong Soo Lee, Ms. Jan Ruff O'Herne, and Ms. Koon-Ja Kim. HR 8872 (Statement by Rep. Mike Honda). The bill had 167 co-sponsors on both sides of the aisle. *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:H.RES.121:.

These Congressional findings and statements of policy prove that a memorial honoring the victims of sexual slavery during World War II is not contrary to federal policy. Congress is uniquely positioned to hold hearings on these issues and to make factual determinations about historical truths in a way that courts are not. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997) (courts "owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate . . . vast amounts of data.") (internal citations and quotation marks omitted). As the Supreme Court has stated, "it is for the democratically elected branches to assess practices in foreign countries and to determine national policy in light of those assessments." *Munaf v. Geren*, 553 U.S. 674, 678 (2008). This court should hold that a statue that explicitly references and commemorates the passage of a House Resolution cannot possibly conflict with federal foreign policy.

B. <u>The Official Statement of the House of Representatives Proves that No Conflict with Federal Foreign Policy Exists.</u>

While consistently arguing for field preemption, Plaintiffs attempt to state that it is "irrelevant" whether "the state action challenged is in accord with the actions of some federal officials". Op. Br. at 53. First, it is for that reason that field preemption is inappropriate in the area of expressive conduct. The broad field preemption Plaintiffs argue for would prevent statements by local governments even when there was no conflict with federal foreign policy. In effect, it would silence local governments from offering opinions about *anything* occurring abroad. Second, absolutely none of the cases cited by Plaintiffs support the proposition that official Congressional resolutions are meaningless as evidence of federal foreign policy. To the contrary, courts have consistently considered Congressional declarations of foreign policy to be meaningful determinants of federal foreign policy.

Plaintiffs' characterization of House Resolution 121 as "legally nonoperative" does not lead to the conclusion that it is not federal policy. Federal policy is often manifested in non-binding documents. In *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014) *cert. denied sub nom. Norton Simon Museum of Art at Pasadena v. Von Saher*, 135 S. Ct. 1158 (2015), the Ninth Circuit looked to the non-binding Washington Conference

Principles on Nazi Confiscated Art ("the Principles"), produced at the Washington Conference on Holocaust–Era Art Assets in 1998, and found that since the United States was one of the participants in the conference, the principles manifested federal foreign policy.

None of the cases discussed by Plaintiffs concern congressional resolutions that are identical to expressive conduct by local governments. Op. Br. at 53. In *Movsesian*, in fact, three separate Congressional resolutions expressing recognition of the Armenian genocide had previously failed in the face of significant and explicit opposition by the President. *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1057 (9th Cir. 2009) *reh'g granted, opinion withdrawn*, 629 F.3d 901 (9th Cir. 2010) *on reh'g en banc,* 670 F.3d 1067 (9th Cir. 2012) (discussing failed House Resolutions H.R. Res. 106, 110th Congress (2007); H.R. Res. 193, 108th Congress (2003); H.R. Res. 596, 106th Congress (2000)). The Ninth Circuit in its initial opinion, withdrawn when rehearing was granted, discussed the fact that the resolutions had been unsuccessful and that the current federal foreign policy was to *not* formally recognize the Armenian Genocide. In contrast, here, House Resolution 121 passed with bipartisan support and without executive opposition.

Plaintiffs cannot rely on *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941), a case which stated that where Congress has occupied the field by passing "adoption of a comprehensive, integrated scheme for regulation of aliens—including its 1940

registration act—Congress has precluded state action." Congress did not occupy the field here by passage of its resolution condemning the atrocities committed by Japan during World War II. (Plaintiffs themselves belie that assertion when they state that the resolution was "legally nonoperative". Op. Br. at 53.) Congress cannot implicitly occupy the field in an area of traditional state regulation such as the placement of monuments in parks. There must be a "clear conflict" with federal policy in the area of traditional state regulation. *Garamendi*, 539 U.S. at 421.

Nor can Plaintiffs rely on *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 380 (2000), where the "means" used by the state government and the federal government were said to conflict. In that case, both the state and federal governments had passed separate and differing sanctions regimes regulating the extent to which companies could do business in Burma. The court found that a separate state sanctions regime interfered "with the "congressional calibration of force" concerning the pressure to apply to Burma. *Id.* at 380. The court found that the explicit goal of the state procurement statute was to incentivize companies to divest from Burma, and that the financial incentives provided had been effective in securing such divestment. *Id.* at 367, 370. Such a case differs drastically from this case, where Glendale has issued a statement lauding a federal government resolution. *Crosby* found a "true conflict," and specifically that "the state Burma

law" was "an obstacle to the accomplishment of Congress's full objectives." *Id*. at 373.[1] Here, it is obvious on the face of the Complaint that there is no true conflict with Glendale's repetition and reiteration of Congressional statements condemning atrocities. Glendale's expressive conduct is in line with and identical to the statement of foreign policy by the federal government.

Rather than proving the "actions of some federal officials"—here, the House of Representatives—are "irrelevant to the analysis," Op. Br. at 53, *Hines, Crosby,* and *Movsesian* all confirm that courts must look to Congressional statements of policy and Congressional intent in determining the direction of federal foreign policy.[2]

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[1] Plaintiffs also cite *Gade v. Nat'l Solid Wasts Mgmt. Assn*, 505 U.S. 88 (1992). In that case, Congress explicitly required the states to follow a specific process if they wished to pass laws that conflicted with federal regulations, which the state did not do. *Id*. at 96-97. The Court in determining the scope of preemption of state regulations noted that it was concerned with state regulations that posed an "obstacle" to the Congressional scheme. *Id*. at 98-99. This case has nothing to do with the relevance or lack thereof of Congressional enactments in determining the scope of federal foreign policy.

[2] The existence of federal foreign policy on this point is *not* a nonjusticiable political question. *Contra* Ans. Br. at 51 n. 24. In fact, this Court may refer to and rely on official statements of foreign policy by the House of Representatives, although the courts should defer to Congress' ability to set such policy. *See Zivotofsky ex rel. Zivotofsky v. Clinton,* 132 S. Ct. 1421, 1427 (2012) (holding that the fact that a constitutional question involves foreign policy does not create a political question; but further holding that the courts cannot "supplant a foreign policy decision of the political branches with the courts' own unmoored determination."). Questions of constitutionality such as those raised in this case are not political questions. *Id*.

The Supreme Court in *Medellin* clarified that a legally nonoperative statement of policy is not sufficient to *preempt* state or local government procedure or rules. *Medellin v. Texas*, 552 U.S. 491, 531 (2008). Under the Supremacy Clause, only certain sources—the "Constitution," the "laws of the United States," and "treaties"—are the "supreme law of the land," and can preempt state law. U.S. Const., art. VI, § 2. Narrow exceptions may exist only for historical practices where executive agreements were formed. *Medellin*, 552 U.S. at 531("The claims-settlement cases involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals."). A non-binding statement is not binding federal law that can preempt state law in the context of conflict preemption. *Id*. (rejecting the power of the President to issue a Memorandum preempting state law). However, even if there is no legal effect to the Congressional resolution, it is fully sufficient to show that there is absolutely no conflict with federal policy here.

III. Purely Expressive Conduct Falls Outside the "Inner Core of the Foreign Affairs Power" That Is Reserved to the Federal Government

Defendants attempt to sidestep the lack of conflict by arguing that field preemption applies to the entire field of foreign affairs. Op. Br. at 53. But even field preemption requires that the state regulation present "an obstacle" to the implementation of federal foreign policy. Even if this Court found that the

placement of monuments in parks was *not* within the traditional competence of the state, Plaintiffs would still need to show that the regulation occurred in an area reserved for the federal government by the Constitution—and the cases make clear that that area is narrower than anything that conceivably affect foreign policy.

The Supreme Court in *Zschernig* stated specifically that preemption was appropriate only where it would "impair the effective exercise of the Nation's foreign policy." *Zschernig*, 389 U.S. at 440. None of the cases to date have held that field preemption applies to all conduct that could *conceivably* affect foreign relations in some way. Instead, they have discussed specific types of foreign affairs powers wielded by the federal government. Expressive conduct concerning events abroad is not constitutionally reserved to the federal government.

In *Deutsch v. Turner Corp.*, 324 F.3d 692, 711 (9th Cir. 2003), the Ninth Circuit stated categorically that not all foreign affairs functions are denied to states. The question is whether the regulation is "central to the foreign affairs power," or part of the "inner core of the foreign affairs power." *Id*. Thus, Deutsch found that foreign commerce is on the fringes of the foreign affairs power, while "the procedure for resolving war claims" against a "wartime enemy" fall within the federal war power. *Id*. at 712. Similarly, in *Von Saher,* the court rested its finding of field preemption on "the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution." *Von Saher v. Norton*

Simon Museum of Art at Pasadena, 592 F.3d 954, 965-66 (9th Cir. 2010). Because the statute concerned reparations for the Holocaust, and not general claims of stolen property, the Ninth Circuit found that the statute interfered with federal restitution schemes. The federal government had acted in the area to set up some restitution programs. *Id*. at 958.

The *Movsesian* court explicitly referred to the war power as well in examining a reparation program for victims of the Armenian Genocide. *Movsesian*, 670 F.3d at 1074-75. The *Movsesian* court further noted that the President had carefully avoided using the word genocide, although the statute explicitly referred to it. *Id*. at 1077. And it noted that the "concrete policy of redress" enabled the state to "regulate foreign affairs." *Id*. In this case as well, the Ninth Circuit required a specific power reserved to the federal government and a specific intrusion on the core foreign affairs power.

The Ninth Circuit has never found that purely expressive conduct falls within the core foreign affairs power. These cases clearly belie Plaintiffs' assertions that everything dealing with the foreign affairs power is preempted, including that which does not conflict with federal policy. If Plaintiff's argument is taken at face value, speeches concerning events abroad, local resolutions identical to Congressional resolutions, establishment of Sister City relationships, and official statements in support of human rights or recognizing UN Resolutions

could all be suspect and subject to challenge in the courts as preempted even in the absence of a true conflict with federal policy. Cities would be unable to establish Sister Cities or accept donated monuments from abroad, even those representing friendship with other countries. Mayors could not greet visiting dignitaries; governors would be unable to discuss trade or commerce with officials from neighboring countries. The court in *Deutsch, Movsesian,* and *Von Saher* was careful to limit the scope of the federally reserved power to the actual award of reparations, and did not opine about expressive conduct. The placement of monuments in local parks is not even on the fringes of the congressionally awarded foreign affairs power. Indeed, it is not a power Congress has under our federalist constitutional scheme.

Plaintiffs' only attempt to cabin the reach of their doctrine is their citation to *Pleasant Grove*, Op. Br. 57, arguing that the size of the monument makes it different from any other statement. But *Pleasant Grove* makes clear that monuments in parks are in fact government speech. *Id*. at 480–81. The Constitution does not limit the ability of state and local governments to express opinions or maintain their parks as they see fit. Unlike the war power, the ability to express opinions concerning events that happened abroad is not textually committed to the federal government by the Constitution.

CONCLUSION

For the foregoing reasons, this Court should affirm the dismissal of Plaintiff's lawsuit by the District Court.

Dated: May 20, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 29(c)(7) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32 (a)(7)(B), Amicus Curiae Korean American Forum hereby certifies that this Brief of Amicus Curiae is in proportionally spaced Times New Roman font, has a typeface of 14-point, and contains 6,886 words, as counted by my word processing program, exclusive of the portions of the brief exempted by Rule 32(a)(7)(B)(iii).

Dated: May 20, 2015

Respectfully submitted,

By: /s/ Catherine Sweetser
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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 20, 2015. I certify that all participants in the case are CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 20, 2015

Respectfully submitted,

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