No. 16-917

IN THE
Supreme Court of the United States

KOICHI MERA AND GAHT-US CORPORATION,
Petitioners,
v.

CITY OF GLENDALE,
Respondent.

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

BRIEF FOR THE GOVERNMENT OF JAPAN AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

This case involves the question whether it is constitutionally permissible for respondent City of Glendale (Glendale) to disrupt the United States' foreign

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amicus*' intent to file this brief at least 10 days before it was due, and have consented to its filing in letters that have been lodged with the Clerk.

policy of impartially encouraging an amicable resolution of the issue between Japan and the Republic of Korea concerning comfort women during World War II. The federal government has long sought to support the two countries as their ally in their efforts toward a diplomatic solution to this issue. To that end, the United States has carefully and consistently avoided making inflammatory statements about the issue.

The issue of comfort women is contentious and politically sensitive. In 2013, when the City of Glendale installed a public monument in its central park that commemorates comfort women and accuses Japan of international human rights violations, Japan and the Republic of Korea were engaged in bilateral discussions seeking to resolve the issue and find a path forward. The United States was encouraging the two countries to reach a resolution through these diplomatic channels. Installation of the monument provoked a concerned response from high-ranking Japanese officials. *See* Pet. App. 53a–54a (citing concerned comments made soon after the monument was installed by the Japanese Ambassador to the United States and the Japanese Prime Minister).

In December 2015, while this case was pending, the Government of Japan and the Government of the Republic of Korea reached an agreement that lays the foundation for future cooperation between the two countries. *See Announcement by Foreign Ministers of Japan and the Republic of Korea at the Joint*

Press Occasion (Dec. 28, 2015).[2] That agreement was achieved with the support of, and welcomed by, the United States. Secretary of State John Kerry emphasized the United States' "belie[f that] this agreement will promote healing and help to improve relations between two of the United States' most important allies." Press Statement, John Kerry, Secretary of State, *Resolution of the Comfort Women Issue* (Dec. 28, 2015).[3] The United States "applaud[ed] the leaders of Japan and the Republic of Korea for having the courage and vision to reach this agreement," "call[ed] on the international community to support it," and "look[ed] forward to continuing to work with both countries on regional and global issues, including advancing our economic ties and security cooperation." *Id.*

The 2015 agreement "finally and irreversibly" resolves the comfort women issue between Japan and the Republic of Korea, *id.*, and the agreement includes a pledge by both countries to "refrain from accusing or criticizing each other regarding this issue in the international community," *Announcement by Foreign Ministers of Japan and the Republic of Korea at the Joint Press Occasion*, *supra*. The monument in Glendale Central Park presents a significant impediment to Japan's diplomatic efforts on this issue. Because the monument is not in line with the spirit of the 2015 Agreement between Japan and the Republic of Korea, it has also been an imped-

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[2] *Available at* http://www.mofa.go.jp/a_o/na/kr/page4e_000364.html.

[3] *Available at* https://2009-2017.state.gov/secretary/remarks/2015/12/250874.htm.

iment to smooth implementation of the Agreement. In the view of the Government of Japan, that fact has diplomatic significance not only for the Government of Japan, but also the Government of the Republic of Korea and the Government of the United States.

Japan is an important ally of the United States. *See* Prime Minister Shinzo Abe, "Toward an Alliance of Hope," *Address to a Joint Meeting of the U.S. Congress* (April 29, 2015) (describing the relationship between Japan and the United States as "an alliance that is sturdy, bound in trust and friendship, deep between us").[4] Practically speaking, Japan has a significant interest in the United States' foreign policy being made by the federal government rather than by States or localities with whom Japan "cannot negotiate" about foreign policy. *See National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 54 (1st Cir. 1999), *aff'd sub nom. Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000).

Japan has only filed *amicus* briefs with this Court in a small number of matters, limiting its involvement to cases involving its core national interests. *See, e.g.*, Brief of the Government of Japan as *Amicus Curiae* in Support of Petitioners, *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, No. 03-724, 2004 WL 226390. The Government of Japan urges that the petition be granted and wishes to convey the importance of this Court's review of the Ninth Circuit's decision.

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[4] *Available at* http://japan.kantei.go.jp/97_abe/statement/201504/uscongress.html.

SUMMARY OF ARGUMENT

The historic practice of the United States has been to address the comfort women issue, like other residual issues from World War II, "through a settled foreign policy of state-to-state negotiation with Japan." *Hwang Geum Joo* v. *Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005). One reason for this settled foreign policy is that it respects rather than disrupts "Japan's 'delicate' relations with *** Korea." *Id.* (quoting Statement of Interest of the United States at 34–35). The Glendale monument represents an interference with, and a departure from, that settled foreign policy.

The Ninth Circuit affirmed the legality of the Glendale monument, in a decision that finds no support in precedent or principle. Precedent shows that courts, including this Court, have been consistently wary of actors other than the federal government playing a role in foreign affairs. And first principles show that courts are right to be wary: foreign policy is a sensitive domain. The Government of Japan seeks this Court's review of the Ninth Circuit's decision. That decision gives States and localities an "expressive" exemption in the domain of foreign policy—a domain in which the United States' role is constitutionally established as exclusive—and thereby risks harm to the United States and its close allies, such as Japan.

ARGUMENT

THE FEDERAL GOVERNMENT'S AUTHORITY TO CONDUCT FOREIGN AFFAIRS IS EXCLUSIVE

A. Foreign Affairs Preemption

Several cases decided by this Court have defended the exclusive foreign affairs authority of the federal

government against state encroachment. In *Zschernig* v. *Miller*, 389 U.S. 429, 430 (1968), for example, the Court struck down an Oregon probate statute restricting when a nonresident alien could receive property from the estate of an Oregon resident who died intestate. *Id.* at 430. It held that the statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* at 432. Although States have "traditionally regulated the descent and distribution of estates," this was not enough to save the statute from invalidity because of the "dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy." *Id.* at 441.

A few decades later, in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 366 (2000), the Court struck down the Massachusetts Burma Law, a law "restricting the authority" of Massachusetts agencies to "purchase goods or services from companies doing business with Burma." *Crosby* held that law "invalid under the Supremacy Clause of the National Constitution." *Id.* And it noted that the Massachusetts law compromised the "very capacity of the President to speak for the Nation with one voice in dealing with other governments" by drawing complaints from "allies and trading partners" of the United States. *Id.* at 381–82.

When California enacted the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), requiring "any insurer doing business in that State to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one 'related' to it," the Court acted again to strike it down. *American Ins. Ass'n* v. *Garamendi*, 539 U.S.

396, 401 (2003). The Court held that the statute impermissibly interfered with the "National Government's conduct of foreign relations." *Id.* And it took note of "the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA." *Id.* at 425.

These foreign affairs preemption cases confirm the venerable proposition that exclusive foreign affairs authority is vested in the United States government. *See Hines* v. *Davidowitz,* 312 U.S. 52, 63 (1941) ('Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."). The decision below departs from this Court's consistent position and merits review and reversal on that basis.

B. The Ninth Circuit's Invention Of An "Expressive" Exception To Foreign Affairs Preemption Warrants Review

The cases cited above confirm the position supported by the Government of the United States that "under the Constitution, the conduct of American diplomatic and foreign affairs is entrusted to the *** federal government." *See* Statement of Interest of the Government of the United States in Support of the Government of Japan, *Rosen* v. *Japan*, No. 01 C 6864 (N.D. Ill. Mar. 11, 2003) (U.S. *Rosen* Statement of Interest).

The Ninth Circuit's decision does not square with the above-mentioned position of the United States,

as demonstrated by a comparison to this Court's decisions. The Court has held that state laws pertaining to insurance regulation and estate law did not serve traditional state responsibilities when those rules were tailored toward addressing foreign policy. *See Zschernig*, 389 U.S. at 441; *Garamendi*, 539 U.S. at 425. Yet, the Ninth Circuit found that "Glendale's establishment of a public monument to advocate against 'violations of human rights' is well within the traditional responsibilities of state and local governments," because "memorializing victims and expressing hope that others do not suffer a similar fate" are "consistent with a local government's traditional function of communicating its views and values to its citizenry." Pet. App. 12a–13a. Considered at this level of abstraction, the Glendale monument may be "consistent with" a traditional function of local government. But *Zschernig* and *Garamendi* make clear that this is not the proper state-interest analysis. *See Zschernig*, 389 U.S. at 441; *Garamendi*, 539 U.S. at 425. And here Glendale officials openly declared that the monument "really put the city of Glendale on the international map" and that the comfort women issue "did not have any bearing on the city itself, and was an international issue mainly between Japan and the Republic of Korea." Pet. App. 53a.

Furthermore, the Ninth Circuit gave no weight to the fact that "various Japanese officials have expressed disapproval of the monument," Pet. App. 14a, despite the weight given to that consideration in *Crosby*. *See Crosby*, 530 U.S. at 382. Similarly, the Ninth Circuit seemed to give significant weight to the fact that petitioners did not allege that the "federal government has expressed any view on the

monument," Pet. App. 14a, without even attempting to distinguish *Zschernig*, where this Court held a state statute invalid under the foreign affairs preemption doctrine despite reassurances from the State Department that the law would not unduly interfere with United States foreign policy, *see Garamendi*, 539 U.S. at 417.

The Ninth Circuit further contorted foreign affairs preemption by creating an exception to the preemption for "expressive" acts. Pet. App. 11a. This newly-minted exception finds no support in the cases relied on by the Ninth Circuit. None of them suggest that expressive actions should receive relaxed scrutiny under established foreign affairs preemption doctrine. Indeed, this would be a strange proviso to embed in foreign affairs preemption, since "the great bulk of foreign policy is words," Harvey Starr, *Henry Kissinger: Perceptions of International Politics* 84 (1984).

Moreover, such a limitation on foreign affairs preemption would make little sense because the speech of a city like Glendale is not constitutionally protected. *See Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1038 n. 12 (5th Cir. 1982) (*en banc*) ("Government expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression ***."); *Aldrich* v. *Knab*, 858 F. Supp. 1480, 1491 (W.D. Wash. 1994) (holding that "unlike private broadcasters, the state itself does not enjoy First Amendment rights").

As the United States has emphasized before in support of Japan, "on matters of international relations, the United States needs to speak with one

voice." *See* U.S. *Rosen* Statement of Interest 50. The appearance of the word "speak" in that last sentence is not accidental: foreign policy is as much about words as it is about actions. Glendale installed its statue to send a message to the world, to take a stand on foreign policy. Certiorari is warranted to reaffirm that a municipality cannot undermine the unified message that the United States must send—and has consistently sent on this issue—in its foreign policy making.

C. Japanese-Korean Relations Are Delicate And Could Be Disrupted By Conflicting United States Pronouncements On The Comfort Women Issue

Japan strongly disagrees that the inscription on the Glendale monument accurately describes the historical record, which Japan has studied at length. Last year at the Committee for the Convention on the Elimination of All Forms of Discrimination Against Women, in Geneva, Japan's Deputy Minister for Foreign Affairs testified about the results of Japan's full-scale fact-finding study in the 1990s. *See* Summary of Remarks by Mr. Shinsuke Sugiyama, Deputy Minister for Foreign Affairs, *Question and Answer Session, Convention on the Elimination of All Forms of Discrimination Against Women* (Feb. 16, 2016) (discussing the results of Japan's investigation, including a lack of evidence to support a claim that 200,000 women were coerced into sexual slavery).[5]

The claims of individuals, including comfort women, are addressed by a 1965 Agreement Between

[5] *Available at* http://www.mofa.go.jp/a_o/rp/page24e_000163.html.

Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation. This 1965 Agreement underscores that the comfort women issue should be handled as a matter of government-to-government diplomacy. Indeed, Japan and Korea's ongoing diplomacy on the issue, supported by the United States, led to an aforementioned agreement in 2015 as well. The Government of Japan honors the 2015 Agreement and continues to implement it in a very faithful manner.

It is of the utmost importance to Japan that States or localities like Glendale may not insert themselves into foreign relations, especially on sensitive subjects like this one, so that they can not undermine the unified message that the United States of America must send in its foreign policy making.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted.

Respectfully submitted,

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