No. 16-917

IN THE

Supreme Court of the United States

KOICHI MERA, *et al.*,

Petitioners,

v.

CITY OF GLENDALE, CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners identify no compelling reason for granting their petition. They concede that no circuit conflict exists as to the question presented, and identify no important question of federal law meriting this Court's review. Instead, they accept the principles of law as the Ninth Circuit identified them, and challenge only their application to the facts of this case.

Even if Petitioners had identified an important question of federal law, their petition still would not warrant review because Petitioners' "Foreign Affairs Preemption" claim is barred by res judicata. After the Ninth Circuit issued its decision in this case, the judgment of a California state court dismissing with prejudice an identical claim filed by the same Petitioners became final. As a result, Petitioners are now barred from relitigating that same claim in the federal courts.

STATEMENT OF THE CASE

The Japanese imperial military forced thousands of "Comfort Women" into sexual slavery during World War II. In 1993, the government of Japan acknowledged the "involvement of the military authorities" in the crimes against the Comfort Women, and apologized for the "immeasurable pain and incurable physical and psychological wounds" the Comfort Women suffered.[1] The Japanese government has periodically reaffirmed that apology,

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[1] 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"* (Aug. 4, 1993), http://www.mofa.go.jp/policy/women/fund/state9308.html.

including on April 28, 2015, when Prime Minister Shinzo Abe said he was "deeply pained to think about the comfort women who experienced immeasurable pain and suffering as a result of victimization due to human trafficking."[2]

The United States government has also recognized the crimes committed against the Comfort Women. For example, in a statement of interest filed in *Joo* v. *Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001), cited by Petitioners, the government explained that the plaintiffs in that case were "held as 'Comfort Women' during World War II by Japanese military forces," and that the

> horror of [their] ordeal can scarcely be overstated. There is no dispute about the moral force animating their quest to redress the wrongs done to them. At the conclusion of the Second World War, the United States condemned, in the strongest possible terms, the Japanese Government's conduct before and during the War[, and] conducted War Crimes Trials, which resulted in the execution or other punishment of hundreds of Japanese perpetrators of atrocities.

ER 36 (Statement of Interest of the United States of America at 1, *Joo*, No. 00-CV-02233, ECF No. 36). Similarly, on April 25, 2014, former President Obama stated publicly that

> any of us who look back on the history of what happened to the comfort women … have to recognize that this was a terrible, egregious

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[2] Office of the Press Sec'y, White House, *Remarks by President Obama and Prime Minister Abe of Japan in Joint Press Conference* (Apr. 28, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/04/28/remarks-president-obama-and-prime-minister-abe-japan-joint-press-confere.

> violation of human rights. Those women were violated in ways that, even in the midst of war, was shocking. And they deserve to be heard; they deserve to be respected; and there should be an accurate and clear account of what happened.[3]

In this action, Petitioners challenge Glendale's approval and installation in a public park of a Monument honoring the Comfort Women, which includes a plaque describing their ordeal and commemorating recognition by Glendale and the U.S. House of Representatives of their suffering. Pet. 10-12 (quoting the plaque's language). Petitioners are offended by the message conveyed by the Monument, particularly its recognition of House Resolution 121 "urging the Japanese Government to accept historical responsibility for these crimes." *Id*. at 12 (emphasis omitted). Accordingly, Petitioners filed this lawsuit to have the Monument declared unconstitutional and permanently removed, claiming that its mere presence interferes with the Federal Government's foreign affairs powers. The district court dismissed the complaint with prejudice, holding that the Petitioners lacked Article III standing and also failed to state a valid cause of action under Rule 12(b)(6). Pet. App. 4a. The Ninth Circuit found that Petitioner Koichi Mera had standing, but agreed that Petitioners failed to state a claim that the Monument is preempted. *Id*. at 2a. As a result, the Ninth Circuit affirmed the dismissal with prejudice.

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[3] Office of the Press Sec'y, White House, *Press Conference with President Obama and President Park of the Republic of Korea* (Apr. 25, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/04/25/press-conference-president-obama-and-president-park-republic-korea.

On September 3, 2014, after the district court dismissed Petitioners' claims in this case and the same day Petitioners noticed their appeal, Petitioners filed another complaint against Respondent City of Glendale, this time in California Superior Court. In their state court complaint, Petitioners asserted, among other claims, the identical federal law claim for "Unconstitutional Interference with Foreign Affairs Power" that the federal district court had dismissed in this action.[4] *Compare* Pet. App. 58a (federal complaint), *with id.* at 134a (California complaint).

At a hearing on February 23, 2015, the Superior Court granted Glendale's special motion to strike the complaint pursuant to California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16. *Gingery v. City of Glendale*, No. B264209, 2016 WL 6900720, at *5-6 (Cal. Ct. App. Nov. 23, 2016). The court found that Petitioners' lawsuit challenged Glendale's actions in furtherance of its speech and petition rights, and that Petitioners had not demonstrated a probability of prevailing on the merits. *Id.* at *5; *see also* Cal. Civ. Proc. Code § 425.16(b)(1). In particular, the court rejected the foreign affairs power claim, holding that Petitioners had not demonstrated any conflict with federal policy, and had provided "no authority which has held that purely expressive conduct … intrudes upon the federal government's exclusive power to conduct and regulate foreign affairs." *Gingery*, 2016 WL 6900720, at *5. Accordingly, the court dismissed the entire complaint with prejudice. On November 23, 2016, the California Court of Appeal affirmed the Superior Court's judgment in full. *Id.* at *1. As to

[4] The California complaint also added an additional plaintiff, Masatoshi Naoki. Mr. Naoki is not a party to this case.

the foreign affairs preemption claim, the court held that Glendale's installation of the Monument was "not an exercise of governmental power but a declaration of principle … [that] does not conflict with any federal foreign policy." *Id*. at *10. The court also held that the Monument "is expressive conduct that has, at most, an incidental or indirect effect on foreign affairs." *Id*. The petitions for rehearing were denied on December 23, 2016, and Petitioners did not seek review by the California Supreme Court. On February 1, 2017, the Court of Appeal issued the remittitur, confirming the decision's finality and ending appellate jurisdiction.[5]

REASONS FOR DENYING THE PETITION

I. THE PETITION PRESENTS NO COMPELLING REASON FOR GRANTING REVIEW.

A. Petitioners Concede That No Circuit Split Exists.

Petitioners concede that no conflict presently exists in the lower courts as to the question presented. Pet. 24. They acknowledge that prior decisions have found an impermissible intrusion into the foreign affairs power when states express their views "through [the] regulation of commercial transactions," *id*. at 23, which they tacitly acknowledge did not occur here. The most Petitioners can do, therefore, is warn that "a circuit split will likely develop" at some unspecified point in the future, should another court become the first to extend the prohibition on interference with the foreign affairs

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[5] *See* Docket, *Gingery v. City of Glendale*, No. B264209 (Cal. Ct. App. filed May 21, 2015) http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2109543&doc_no=B264209.

power to mere civic expression. *Id.* at 24. They offer no reason why review in this Court is warranted now, rather than if and when such a conflict actually arises.

B. The Petition Presents No Important Question Of Law Meriting This Court's Review.

1. Glendale's Expressive Conduct Is Well Within The Traditional Responsibilities Of Cities.

Four separate courts – the district court, the Ninth Circuit, the California Superior Court, and the California Court of Appeal – have now examined Petitioners' allegations and concluded that the Monument is not preempted by the foreign affairs power and the Supremacy Clause. As the Ninth Circuit found, Glendale's decision to install the Monument to reflect and express the community's principles and ideals is well within the traditional responsibilities of local governments. Pet. App. 12a. Cities have "long used monuments to speak to the public," *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009), and "[c]ities … 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." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996); *see also Farley v. Healey*, 67 Cal. 2d 325, 328 (1967) ("city councils have traditionally made declarations of policy on matters of concern to the community whether or not they had the power to effectuate such declarations by binding legislation … [including] in matters of foreign policy"). Innumerable local governments have expressed their views on similar foreign policy issues

over the years, including by commemorating them with memorials. *See* Pet. App. 12a (describing local governments' actions commemorating the Holocaust and the Armenian Genocide, and criticizing apartheid South Africa and Boko Haram). Glendale's establishment of the Monument is fully consistent with this long history. This is true even if Glendale's "real purpose" in installing the Monument was, as Petitioners suggest, to have some impact upon foreign affairs.[6] *Id*. at 13a-14a. Whatever others may deem a city's purpose to be, Glendale's conduct here was purely expressive, and a holding that such expressive conduct is preempted by the foreign affairs power "would mark an unprecedented and extraordinary intrusion on the rights of state and local governments … [that would be] antithetical to fundamental principles of federalism and democracy." *Alameda Newspapers*, 95 F.3d at 1415. Expressive conduct does not become unconstitutional solely by virtue of its capacity to influence a public debate.

Petitioners also identify no workable standards by which the federal courts can police the expression of local governments. They concede that Glendale's traditional responsibilities include "recognizing its own citizens' participation in World War II [and] expressing by proclamation certain local ideals." Pet.

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[6] Petitioners also suggest that Glendale's real purpose in erecting the Monument was to "express an anti-Japan viewpoint." Pet. 30 (emphasis omitted). This is belied by the language of the Monument's plaque, which honors Japanese women forced to work as Comfort Women. *See id*. at 11 ("In memory of … women who were removed from their homes in … Japan ….") (emphasis omitted). In any event, the Foreign Affairs power has never been construed to bar citizens, through their municipal governments, from expressing, through a plaque on a monument, a viewpoint on historical events that differs from that of another country.

28. Petitioners would apparently have judges examine city and state plaques, proclamations, resolutions, and statements of principle line-by-line in an attempt to discern if the ideals expressed are sufficiently "local" and the historical events recognized are appropriate for commemoration.[7]

2. Petitioners Cannot Show That The Monument Has An Impermissible Effect On Foreign Affairs.

Additionally, Petitioners have not plausibly alleged that the Monument has had an effect on foreign affairs that is more than "incidental or indirect." Pet. App. 13a-14a. The admitted source of the only "effect" on foreign affairs that Petitioners identify is a monument installed in South Korea, not in Glendale. Pet. 32-33. Petitioners do argue that by asking Japan to "accept historical responsibility" for certain of its past actions, Glendale's monument has offended the highest ranks of the Japanese Government. Pet. App. 14a; Pet. 32. But Petitioners have never pointed to any actual disruption of US foreign policy, or identified any authority for their argument that the dissatisfaction of foreign officials with a political viewpoint is a sufficient effect for preemption purposes. Moreover, Petitioners fail to explain what standards federal courts could possibly apply to determine if the reactions of foreign officials to a city's expression of views are sufficiently negative to merit preemption.[8] Under Petitioners' theory, a local

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[7] And, of course, honoring victims of war crimes and opposing human rights violations can be local ideals, regardless of where the violations occur.

[8] For example, Petitioners suggest that a Japanese official's statement that the Monument "does not coincide with our

monument could change from constitutional to unconstitutional, and presumably back again, as shifting political opinion in other countries changes foreign leaders' positions.

None of Petitioners' authority supports their position, as every case they cite in which preemption was found to apply concerned state or local action that had an actual regulatory and coercive effect.[9] In

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understanding" of the Comfort Women is sufficient to make Glendale's actions unconstitutional. Pet. 15 (emphasis omitted).

[9] *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (requiring insurers in California to make extensive disclosures of information for use in lawsuits regarding the Holocaust, and subjecting violating business to regulatory and criminal sanctions); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (statute barring state entities from doing business with companies that did business in Burma); *Zschernig v. Miller*, 389 U.S. 429 (1968) (statute requiring nonresident aliens to demonstrate, in order to receive inheritance, that the country from which they came granted reciprocal rights to United States citizens, which resulted in state court judges conducting detailed inquiries into the political systems and conduct of foreign nations); *Japan Line, Ltd. v. Cty. of L.A.*, 441 U.S. 434 (1979) (California law imposed ad valorem property tax on foreign-owned cargo containers); *United States v. Pink*, 315 U.S. 203 (1942) (state law regulating property distribution preempted to extent it would have precluded federal government from taking title to property assigned to the United States pursuant to treaty); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (state law required aliens to register and pay a fee each year; provide information to state agency; carry an identification card; show card when demanded by law enforcement; and subjected violators to fines and imprisonment); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012) (en banc) (state law providing a private right of action and suspending statute of limitations for claims against insurance companies by survivors of Armenian Genocide); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009) (providing cause of action, extending statute of limitations, and providing for superior court jurisdiction over causes of action seeking recovery of art

the one other case, not cited by Petitioners, where a court addressed even vaguely analogous city conduct – the installation of a commemorative street sign honoring Bangladesh's former dictator – the court held that the plaintiff's foreign affairs preemption claim failed as a matter of law because there was no cognizable effect on foreign relations. *See US Awami League, Inc. v. City of Chi.*, 110 F. Supp. 3d 887, 893 (N.D. Ill. 2015).

3. Petitioners Cannot Demonstrate That The Monument Conflicts With Federal Foreign Policy.

The Monument also does not conflict with the federal government's policy regarding the Comfort Women. Instead, the Monument is fully consistent with statements of federal officials on the issue, including those identified above. *Supra* 2-3. Moreover, the Monument's plaque commemorates and is consistent with House Resolution 121 passed by the United States Congress on July 30, 2007. Pet. 11-12. While such a resolution does not define the outer boundaries of permissible expression on this issue, it underscores that the views expressed by the residents of Glendale through their elected officials were well within the range that other elected officials in this country have expressed. Such views provide no basis for the relief Petitioners seek, which would be

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confiscated by the Nazis during the Holocaust); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) (creating cause of action for individuals forced to provide slave labor during World War II against corporations that employed such slave labor or their successors-in-interest); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (statute barring state entities from doing business with companies that did business in Burma).

an unprecedented constitutional restraint on civic expression as to conduct abroad.

4. Petitioners Argue Only That The Ninth Circuit Misapplied The Facts To The Correct Legal Standards.

Finally, even if the Ninth Circuit's decision were incorrect on these facts, the Petition itself applies the same legal standards that the Ninth Circuit applied.[10] *Compare* Pet. 26-27, *with* Pet. App. 9a-10a (identifying identical standards for field and conflict preemption). Ultimately, Petitioners' argument is that the Ninth Circuit applied the correct legal standards, but reached an incorrect decision "under the facts of the case." Pet. 24. This petition, alleging only the misapplication of a properly stated rule of law, does not warrant this Court's review.

II. PETITIONERS' CLAIM IS BARRED BY RES JUDICATA.

Even if the Court were to consider the question presented sufficiently important to warrant plenary review, this case does not present a proper vehicle for addressing it. Any further consideration of Petitioners' claim is now barred by res judicata. Res judicata precludes the continued litigation of claims that previously have been decided by a final judgment on the merits. The doctrine "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Furthermore, according preclusive effect to

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[10] Petitioners suggest that the Ninth Circuit somehow "oversimplified" this Court's holding in *Garamendi*, 539 U.S. 396, but do not attempt to explain how it did so. Pet. 24-26.

state court judgments also "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Id.* at 96. This Court has explained that res judicata

> is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

San Remo Hotel, L.P. v. City & Cty. of S.F., Cal., 545 U.S. 323, 337 (2005) (quoting *S. Pac. R.R. v. United State*s, 168 U.S. 1, 49 (1897)).

By enacting 28 U.S.C. § 1738, "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen*, 449 U.S. at 96; *see also Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481-82 (1982) (section 1738 "commands a federal court to accept the rules chosen by the State from which the judgment is taken"). Accordingly, California law determines the preclusive effect of the state court judgment in this case.

Under California law, res judicata precludes a subsequent lawsuit if

> (1) [the] claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding

> resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.

Boeken v. Philip Morris USA, Inc., 48 Cal. 4th 788, 797 (2010). Each of these requirements is met here.[11]

A. Identical Causes Of Action.

The "Unconstitutional Interference with Foreign Affairs Power" claim Petitioners' asserted in the state court action is identical to the claim they assert here. In California, the "primary rights theory" is used to determine whether proceedings involve identical causes of action for purposes of res judicata. *Id.* at 797-98. A primary right is "simply the plaintiff's right to be free from the particular injury suffered," and even where recovery could be based on multiple legal theories, a single injury gives rise to only one cause of action. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 904 (2002); *Boeken*, 48 Cal. 4th at 798.

Here, both the injuries and legal theories asserted are identical. Both claims allege that Glendale's approval and installation of the Monument violated the "foreign affairs powers of the United States" – identified as article II, section 1, clause 1; section 2,

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[11] Glendale previously argued that the district court's judgment precluded litigation of Petitioners' foreign affairs claim in the California courts. Petitioners contended that res judicata did not apply, including because the district court held that Petitioners lacked standing, and therefore the court lacked jurisdiction, before proceeding to the merits of the claim. The Superior Court found that res judicata did not apply, and the Court of Appeal did not address the issue. Instead, both courts proceeded to the merits of Petitioners' claims and held that they failed as a matter of law. *See Gingery*, 2016 WL 6900720, at *5, 10.

clause 1; section 2, clause 2; and section 3 of the U.S. Constitution – and the Supremacy Clause. *Compare* Pet. App. 41a ¶ 1 & 60a ¶ 65 (Federal Complaint), *to id*. at 133a ¶ 24 & 134a-135a ¶ 28 (CA Complaint). The claims also both allege that "Glendale's action takes a position on matters of foreign policy with no claim to be addressing a traditional state responsibility." *Id*. at 59a ¶ 64 (Federal Complaint); *id*. at 134a-135a ¶ 28 (CA Complaint). Additionally, the complaints suggest that Glendale's actions have an effect on foreign relations that is more than "incidental" or "indirect," (*id*. at 59a ¶ 61; *id*. at 135a ¶ 30), and point to criticism of the Monument by Japanese government officials to demonstrate the allegedly disruptive effect (*id*. at 59a ¶ 63; *id*. at 125a-126a ¶ 9). Thus, the causes of action are identical for res judicata purposes.

B. Final Judgment On The Merits.

The state court's dismissal of Petitioners' complaint pursuant to the anti-SLAPP statute, affirmed on appeal with remittitur issued, is a final judgment on the merits. First, under California law "granting a motion to strike under [the anti-SLAPP statute] results in the dismissal of a cause of action on the merits." *Varian Med. Sys. Inc. v. Delfino*, 35 Cal. 4th 180, 193 (2005); *see also Traditional Cat Ass'n v. Gilbreath*, 118 Cal. App. 4th 392, 398 (2004) (explaining that "on its face" the anti-SLAPP statute "contemplates consideration of the substantive merits of the plaintiff's complaint"). A number of federal courts have found that dismissal pursuant to the anti-SLAPP law constitutes a judgment on the merits giving rise to res judicata. *See Finander v. Eskanos & Adler*, 255 F. App'x 192, 192 (9th Cir. 2007) (holding that the district court "properly dismissed [the plaintiff's] action on the basis of res judicata

because it involved the same claims and parties as a prior state court action that was dismissed on the merits under the [SLAPP] laws"); *Adams v. Trimble*, No. Civ S-11-01360-KJM-EFB, 2012 WL 260160, at *7-8 (E.D. Cal. Jan. 27, 2012) (explaining that a "state case thrown out as the result of an anti-SLAPP motion … has been fully adjudicated because the state court granting the anti-SLAPP motion necessarily determined the case had no merit"); *Chase v. Cty. of San Bernadino*, No. EDCV 12-1082 (OPx), 2012 WL 12850677, at *5 (C.D. Cal. Nov. 6, 2012) (holding that "[i]n light of the parties' burdens in an anti-SLAPP motion," dismissal of a plaintiffs' claims under the law is "an adjudication on the merits" for preclusion purposes); *Haynes v. Hanson*, No. 11-cv-05021-JST, 2013 WL 1390387, at *4 (N.D. Cal. Apr. 4, 2013) (finding that plaintiff's claims were barred by res judicata because state court's earlier dismissal of same claims pursuant to an anti-SLAPP motion "was an adjudication on the merits").

In this case, the California courts examined the merits of Petitioners' foreign affairs preemption claim. The Superior Court rejected Petitioners' argument that Glendale's purely expressive conduct is subject to foreign affairs preemption, concluding that Petitioners had not established a probability of prevailing on the claim. *Gingery*, 2016 WL 6900720, at *5. Similarly, the California Court of Appeal reviewed in detail Petitioners' allegations and evidence, and found the Monument "is not an exercise of governmental power but a declaration of principle." *Id*. at *10. The court held that Glendale's expressive conduct did not conflict with any federal policy, did not seek to "regulate or conduct foreign affairs," and had at most "an incidental or indirect effect" on foreign relations. *Id*. Thus, the court concluded that

Petitioners' foreign affairs preemption claim was meritless. *Id*.

The state court judgment is now final. In California, a judgment becomes final when all appeals are exhausted or the time to appeal has expired. *See, e.g., Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 808 (9th Cir. 2007). As explained above, the California Court of Appeal affirmed in full the trial court's order and judgment granting Glendale's anti-SLAPP motion and dismissing Petitioners' complaint with prejudice. *See Gingery*, 2016 WL 6900720, at *1. Petitioners failed to timely seek review in the California Supreme Court, and the Court of Appeal issued the remittitur ending appellate jurisdiction over the case.[12] *See In re Grunau*, 169 Cal. App. 4th 997, 1002 (2008) ("Remittitur is the device by which an appellate court formally communicates its judgment to the lower court, finally concluding the appeal and relinquishing jurisdiction over the matter.").

Petitioners also cannot now seek review of the California courts' decisions in this Court. Because they did not ask the state Supreme Court to review the Court of Appeal's judgment, this Court lacks jurisdiction to review the decision under 28 U.S.C. § 1257(a). *See Banks v. California*, 395 U.S. 708 (1969) (per curiam) (dismissing writ of certiorari for

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[12] Under California law, a decision of the Court of Appeal becomes final 30 days after it is issued, (Cal. Ct. R. 8.264(b)(1)), and a petition for review by the California Supreme Court must be filed within 10 days after the Court of Appeal decision is final (*id*. 8.500(e)(1)). Thus, to seek review in the state supreme court, Petitioners had to file a petition for review by January 3, 2017. They failed to do so. The California Supreme Court may grant review on its own motion within 30 days after a Court of Appeal decision is final. *Id*. 8.512(c)(1). It did not do so here.

want of jurisdiction where petitioner failed to seek review in California Supreme Court). Accordingly, Petitioners' appeals are exhausted and the state court decision granting Glendale's anti-SLAPP motion and dismissing Petitioners' complaint with prejudice is a final judgment on the merits. The fact that the state court judgment became final while the instant appeal was pending also does not alter the analysis. State court judgments have preclusive effect once they become final, even where federal court litigation is ongoing.[13]

C. Identity Of The Parties Against Whom Preclusion Is Asserted.

The requirement of identity of the parties is also met here. Both Petitioners – Koichi Mera and GAHT-US Corporation – were named plaintiffs in the state court action.[14] *See Brother Records, Inc. v.*

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[13] *See Spoklie v. Montana*, 411 F.3d 1051, 1055-56 (9th Cir. 2005) (state court judgment dismissing federal takings claim that became final while appeal was pending in federal circuit court barred relitigation of that claim in the federal courts); *Jackson v. N. Bank Towing Corp.*, 213 F.3d 885, 890 (5th Cir. 2000) (per curiam) (affirming dismissal based on res judicata from state court judgment that became final while appeal was pending); *see also United States v. 5 Unlabeled Boxes*, 572 F.3d 169, 175 (3d Cir. 2009) (holding that res judicata from earlier federal order that was affirmed while appeal was pending barred relitigation of claims). The same rule applies in California. *See Consumer Advocacy Grp., Inc. v. ExxonMobil Corp.*, 168 Cal. App. 4th 675, 684 (2008) ("Where two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but *the first final judgment*, although it may be rendered in the second suit, that renders the issue *res judicata* ….") (emphases in original).

[14] Another plaintiff in both this case and the state court action, Michiko Shiota Gingery, died during the pendency of this appeal.

Jardine, 432 F.3d 939, 943 (9th Cir. 2005) ("In California, a judgment has res judicata effect on another case if … the party against whom the res judicata plea was asserted was a party in the prior case."). Moreover, Glendale was the named defendant in both actions. Thus, this element of res judicata is satisfied as well.

Given res judicata's purpose of "preventing inconsistent verdicts," it must apply here to bar identical plaintiffs from attempting to litigate identical claims to conflicting verdicts in two different courts. *Allen*, 449 U.S. at 94.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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