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

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MARCH 10, 2017

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INTRODUCTION

Respondent, the City of Glendale, California, makes no effort to analyze the new rule that the Ninth Circuit has announced abrogating the broad power of the federal government to speak for our nation as one voice on foreign affairs. The Ninth Circuit breaks with a longstanding tradition of federal preemption of foreign affairs enactments by state and local government, creating a new "exception" for "merely expressive" state and local government speech, even when that expression is permanent, conflicts with expressions of foreign policy by the federal government, and strains ties with important allies of the United States such as the sovereign nation of Japan.

As set forth in the Petition, the Ninth Circuit's ruling is inconsistent with Supreme Court holdings, as well as holdings in other circuits that have consistently overturned state and local government attempts to influence foreign policy.

In opposition, Glendale relies on an improperly presented, hyper-technical, and fallacious *res judicata* argument. Glendale contends, for the first time in this action, that the Supreme Court is deprived of jurisdiction over this first-filed case by an unpublished California appellate opinion after a California trial court and a three-judge panel of the California court of appeal refused to stay the state court action that responded to the original District Court ruling in this case. Glendale is judicially estopped from advancing this facetious argument since it has

previously argued the issue the other way (claiming this federal case precluded the state court action). Moreover, the Supreme Court has the broad plenary power to interpret the United States constitution in this properly-filed Petition. California courts' disregard for principles of comity cannot usurp the role of this Court to ensure proper interpretation of the United States Constitution, particularly when the issue presented is federal preemption of local action.

On the merits, Glendale reiterates its animosity toward Petitioners' objections, twisting the facts and Petitioners' argument to fit their narrative on the ongoing and present foreign policy and diplomatic controversies swirling around the question of "Comfort Women."

Notably, the government of Japan has weighed in as an *amicus* to explain that Glendale's permanent embodiment of Glendale's unique and now-outdated foreign policy demand that Japan "take historical responsibility" for the alleged "crime" of "enslavement" of "more than 200,000 women" who were sex workers during World War II conflicts and interferes with Japan's relations with the United States as well as trilateral relations including South Korea. Respected Japanese historians have explained in a separate *amicus* filing how Glendale's position on this issue does not comport with Japan's understanding, and how Glendale's position is pro-Korea and anti-Japan.

Ignoring the evolving reality, Respondent's brief strains to align a 10-year-old non-binding statement from the House of Representatives and the 24-year-old, and now-discredited "Kono Statement" with the recent treaty between Japan and South Korea—

lauded by the last presidential administration—which Japan explained to this Court, fully resolves the issue of the "Comfort Women." Glendale's 2013 demand to Japan is out of step with the current foreign policy of the United States. Indeed, Glendale's own argument regarding how "unworkable" it is for courts to discern which permanent statements of local values are in line with the United States foreign policy simply proves what is disputed. Municipalities cannot and should not establish permanent statements of foreign policy demanding that a foreign sovereign "take historical responsibility" for alleged war crimes.

The Court should grant *certiorari* to establish that the federal government has the exclusive power to dictate the foreign policy for all the United States. The Constitution does not permit states and municipalities to circumvent the exclusive foreign affairs power of the United States through a permanent monument that excoriates a sovereign nation and an ally like Japan. Glendale's continued attack through the monument–and the accompanying plaque–has caused great turmoil in Japan. Glendale's position inappropriately suggests that the United States favors the views of certain Korean groups who sponsored the monument and plaque over the conflicting positions held by the governments of the United States and of Japan today. The federal government has not taken the position that Glendale seeks to advance.

Glendale's attempt to influence U.S. foreign policy in Asia is preempted by the Constitution.

ARGUMENT

I. THIS CASE INVOLVES THE DEPARTURE FROM PRECEDENT BY NINTH CIRCUIT ON AN IMPORTANT ISSUE OF FEDERALISM

In this case, the Ninth Circuit has departed from Supreme Court precedent and announced an exception to the long-standing rule preempting local interference in the exclusive federal power over foreign affairs, holding that the Supremacy Clause does not preempt "a local government's expression, through a [permanent] public monument [and granite plaque], of a particular viewpoint [excoriating America's ally] on a matter related to foreign affairs . . . " *Gingery v. City of Glendale*, 831 F.3d 1222, 1229 (9th Cir. 2016). In other words, the Ninth Circuit has created an exception to the rule of pre-emption for "permanent expressive government speech" in matters of foreign policy. This is contrary to the Constitution, which contains no such exception, and to decades of established Supreme Court and Circuit Court precedent which has never held that "purely expressive government speech" may intrude on the exclusive province of federal foreign affairs.

Glendale disingenuously attempts to spiral one sentence in the Petition into an admission by Petitioners regarding an alleged absence of circuit split. This is a misleading "straw man" argument. Petitioners explained in the opening brief that the Ninth Circuit decision conflicts with Supreme Court precedent, with Ninth Circuit precedent, and with

rulings by other circuit courts. Specifically, the ruling below seeks to limit Supreme Court holdings pre-empting local action that seeks to influence foreign affairs in *Zschernig v. Miller*, 389 U.S. 429, 440–41, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968) and in *American Insurance Association v. Garamendi*, 539 U.S. 396, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003), *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 & n.5 (9th Cir. 2012).

To be sure, the new exception announced below departs from a long line of cases in the First, Second, Third, and Fifth Circuits, as well as the Circuit Court for the District of Colombia and prior Ninth Circuit decisions. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 62 (1st Cir. 1999), *aff'd on other grounds*, 530 U.S. 263 (2000); *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 11, 1st Cir. (Mass.); *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115, 2nd Cir. (N.Y.); *cf. In re Nazi Era Cases Against German Defendants Litigation*, 196 Fed.Appx. 93, 98+, 3rd Cir. (N.J.); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 578, 5th Cir. (La.); *Saleh v. Titan Corp.*, 580 F.3d 1, 11, D.C.Cir.; *Movsesian*, *Von Saher*, and *Deutsch*.

Every prior decision, in the Supreme Court and in every Circuit Court to consider the issue has held that the United States federal government has exclusive foreign affairs power under the United States Constitution. Petitioners have met two of the three subparts of Rule 10 of the Supreme Court of the United States, "Considerations Governing Review on Writ of Certiorari," because (a) the Ninth Circuit "has entered a decision in conflict with the decision of

another United States Court of Appeals on the same important matter" (the First, Second, Third, Fifth, Ninth, and D.C. Circuits); and (c) the Ninth Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

This Court should decide if there is to be an abrogation of the standards in *Zschernig*, 389 U.S. 429, and in *Garamendi*, 539 U.S. 396, that would permit cities and states to enact foreign policy initiatives on controversial and important issues that are literally "cast in stone," on the theory that such policies are "merely" government speech.

Notably, Glendale cannot identify a single Court of Appeal decision that is on point and in line with the Ninth Circuit's exception to the rule of pre-emption. Glendale cites only one, inapposite federal case in the area of labor relations to argue that "declarations and pronouncements" (but not permanent monuments excoriating our allies in granite in a public park) are a traditional area of state responsibility. (Opp.Br.6-7, citing *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996)). And Glendale's reliance on *Summum* (a First Amendment Establishment Clause case) stands for nothing more than the unsurprising proposition that a permanent monument sponsored by private interest groups is a form of government speech. (*Id.*, citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).) Glendale offers no authority for the Ninth Circuit's new rule in this critical area, other than a District Court case

concerning a street sign, that was decided based on a lack of standing. (Opp.Br.10, citing *US Awami League, Inc. v. City of Chi.*, 110 F.Supp.3d 887 (N.D. Ill. 2015).) In *Awami*, the district court held that the petitioners lacked standing because they could show no cognizable injury in fact–unlike Petitioners here, who were deprived of the use of public facilities.

Indeed, the Ninth Circuit correctly found that Petitioner Mera had standing based upon his particularized injury, since Glendale's decision to use public land to permanently state its foreign policy views, which are tilted toward Korea's perspective on disputed historical events and current geopolitical negotiations involving the United States, as well as accusing the nation of Japan and implicating Japanese people in crimes of rape and sexual slavery.

The essential and core issue here is that Glendale's permanent monument is far different from the cases involving transient "declarations" and "proclamations" cited by Glendale. Tellingly, Glendale's Opposition continues to rely on out-of-date non-binding policy statements, such as a 2007 House Resolution that is of no effect today–to find any federal support for its policy. Glendale's monument continues to exist–unchanged–four years after it was first erected, despite international negotiations and a new federal administration, its permanent castigation of Japan–in stone, marble and concrete is the fundamental difference that renders it different from other cases of transient government speech as mentioned in Alameda Newspapers.

Glendale's inaccurate and outdated 2013 demand that Japan must "take historical responsibility" for

the "crime" of "enslaving" "more than 200,000" sex workers has become even more offensive to Petitioners and to federal policy since Japan has already entered into a binding treaty with South Korea on that very issue in 2015. (*See* Amicus Brief of Japan, *passim*) The obsolescence of Glendale's permanent monument now indicates that it was unconstitutional from the outset and violates the federal foreign affairs power since the United States government must be free to speak on behalf of the entire nation with one voice and evolve its position over time.

Glendale's attempt to define United States foreign policy toward Japan is preempted.

II. THIS COURT IS NOT BARRED FROM REVIEWING THE CASE BEFORE IT

Glendale does not dispute that the Supreme Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254 as it is a timely filed petition following a decision of the Ninth Circuit Court of Appeals.

Instead, Glendale argues, for the first time in opposing this Petition, that the federal courts are deprived of jurisdiction, based on an unpublished ruling in a California state trial courts, and the opinion of a three-judge panel of California appellate judges. Glendale makes no effort to present this Court with the full text of the California court decisions, nor does Glendale submit any portion of the voluminous record in the California state courts. (Reply.App.1a-11a [docket of the California Superior Court action].)

Instead, Glendale relies on a few Westlaw citations to an unpublished California decision in support of its new claim—unprecedented in this action, and

contrary to its prior position (Reply.App.8a-69a), that the Supreme Court is barred from considering this properly-filed petition out of hand based upon rulings in the California courts.

Glendale's effort to deprive this Court of jurisdiction should be rejected.

Notably, Glendale completely omits to mention that it is judicially estopped from claiming that the state court action is a *res judicata* bar to the federal court action, since it argued it the other way around in the California state courts in connection with its special motion to strike the state court complaint. (Reply.App.68a *et seq.*) Now, Glendale argues that the state court decision bars the United States Supreme Court from determining the contours of the United States Constitution. This Court should reject that argument as judicially estopped. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p.782 (1981) ("a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory . . . to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment . . . [and] to prevent the perversion of the judicial process.") (internal citations omitted). Glendale has "played fast and loose with the courts" by first asserting that the original federal case prevented the second state case from proceeding;

now it asserts that the state case is dispositive of this Petition. (*See Id.*)

The Supreme Court is the ultimate arbiter of the United States Constitution, and is not bound by the ruling of a state court of appeals on a procedural challenge to a case before a California trial court, because "a state court can neither add to nor subtract from the mandates of the United States Constitution." *North Carolina v. Butler*, 441 U.S. 369, 376, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979). Indeed, the Supreme Court does not necessarily defer to the decisions of state courts even on issues concerning the local interpretation of state law, if the question before this Court is an important one. *Bush v. Gore*, 531 U.S. 98, 112, 121 S.Ct. 525, 534, 148 L.Ed.2d 388 (2000).

In an analogous line of cases concerning the abstention doctrine, this Court has repeatedly noted that, "a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 417, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); *San Remo Hotel, L.P. v. City & Cty. of San Francisco, Cal.*, 545 U.S. 323, 340, 125 S.Ct. 2491, 2503, 162 L.Ed.2d 315 (2005). Here, as in *England*, Petitioners elected to file in federal court, only to have a state court decide their federal constitutional claims. (*See* dissent from denial of petition for writ of certiorari, *Arrigoni Enterprises, LLC v. Town of Durham, Conn.*, 136 S.Ct. 1409, 194 L.Ed.2d 821 (2016).)

The District Court found that plaintiffs lacked standing to sue, declined to exercise subject matter jurisdiction over state law claims pertaining to

alleged violations of the Glendale municipal code, and tolled the statute of limitations for 30 days to allow plaintiffs to re-file those claims in state court. *Gingery v. City of Glendale*, No. CV 14-1291 PA (AJWX), 2014 WL 10987395 (C.D. Cal. Aug. 4, 2014), at *6. The district court also refused to grant leave to amend to assert additional claims. (*Id.*) As directed by the district court, plaintiffs re-asserted their claims in state court, and added claims that were prevented by the refusal of leave to amend. Glendale also misrepresents the status of the state court proceedings, and there were and are a variety of filings and unrelated legal issues involved in the state court proceedings.[1] (Reply.App.1a-11a.)

Plaintiffs in the state court action twice attempted to stay the state court proceedings based on well-established principles of comity.[2]

On December 2, 2014, plaintiffs filed an *ex parte* application to stay the state court action pending resolution of this first-filed action (Reply.App.8a-9a, 12a-49a.). The California trial court denied the plaintiffs' application to stay the second action. (Reply.App.11a.) On August 23, 2016, Plaintiffs once again sought a stay of the state court proceedings in a supplemental letter brief, urging the California Court of Appeals to stay the state court proceedings

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[1] For example, the trial court awarded Glendale's *pro bono* legal counsel, Sidley Austin LLP, over $150,000.00 in legal fees.

[2] California courts typically defer their decisions to await the outcome of pending federal proceedings. *Thomson v. Continental Ins. Co.*, 66 Cal.2d 738, 747 (1967); *Berkic v. Moss*, 159 Cal.App.3d 26 (1984).

pending resolution of the case, out of respect for the federal court's jurisdiction over the United States Constitution. (Reply.App.50a-57a.) The court did not stay the case and instead issued an unpublished decision. As further indication of the importance of this matter, globally-affiliated *amicus* supporting Respondent pointed out the many other instances of local "Comfort Women" disputes and the alleged chilling effect of plaintiffs' lawsuit on government speech. (Reply.App.95a-99a.)

Similar to the *England* line of cases, the state court issued its judgment before this Court could take up the appeal of the original district court decision that is before this Court. *See* 375 U.S. at 417. When the Ninth Circuit ruled that Petitioner Mera had standing to sue in federal court, the federal courts regained jurisdiction and the California state court should have stayed its decision based on principles of comity.

The California courts failed to heed plaintiffs' efforts to stay the action pending resolution of this action, and this Court properly has jurisdiction to determine the meaning of the United States constitution. Glendale cannot rely on a local or state decision to deprive the Supreme Court of its jurisdiction.

This case presents a new departure by the Ninth Circuit from established precedent preempting local attempts to set foreign policy. Every circuit court has held this local action preempted and Glendale cites no binding authority to the contrary. This is an important question as the supremacy of the United States government should not be weakened by local governments attempts to "put themselves on the

international map" by castigating an ally of the United States like Japan.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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MARCH 10, 2017

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Reply Appendix

CASE SUMMARY
(SEPTEMBER 3, 2014)

MICHIKO SHIOTA GINGERY ET AL,

vs.

CITY OF GLENDALE

Case No.: BC556600

Case Type: Other Writ/Judicial Review
(General Jurisdiction)
Status: Other Judgment 05/04/2015
Future Hearings none

Documents Filed
(Filing dates listed in descending order)

02/08/2017
Remittitur (REMITTITUR ISSUED ON 2/1/17) Filed by Clerk

12/02/2015
Stipulation and Order (RE APPEAL OF ORDER GRANTING ATTORNEYS' FEES U.S. MAIL) Filed by Attorney for Plaintiff/Petitioner

09/21/2015
Notice (OF ORDER) Filed by Attorney for Defendant/Respondent

09/15/2015
Order Filed by Attorney for Defendant/Respondent

08/25/2015

Ord-Appt Apprv Rptr as Rptr protem (RE VERONICA RODRIGUEZ/CSR #12215) Filed by Attorney for Plaintiff/Petitioner

07/14/2015

Stipulation and Order (STIPULATION TO MOVE HEARING DATE ON DEFT'S MOTION FOR ATTORNEY'S FEES FROM 07/10/15 TO 08/25/2015 - GRANTED) Filed by Attorney for Plaintiff/Petitioner

07/06/2015

Opposition Document (OPP TO DEFTS RQST JUD NTC) Filed by Attorney for Plaintiff/Petitioner

07/06/2015

Reply/Response (REPLY TO DEFTS EVIDENTIARY OBJ TO THE DECL OF GERALD KNAPTON SUBMITTED IN SUPP OF PLTF'S OPP TO DEFTS MTN FOR ATTY FEES) Filed by Attorney for Plaintiff/Petitioner

06/17/2015

Ntc to Reptr/Mon to Prep Transcript Filed by Clerk

06/12/2015

Proof of Service (REPLY/DECL DOCS IN SUPP OF MTN FOR ATTY'S FEES) Filed by Attorney for Defendant/Respondent

06/12/2015

Request for Judicial Notice (DEFT CITY OF GLENDALE'S RQST FOR JUD NTC) Filed by Attorney for Defendant/Respondent

06/12/2015

Declaration (SUPPLEMENTAL DECL OF BRADLEY H ELLIS IN SUPP OF DEFTS MTN FOR ATTY'S FEES) Filed by Attorney for Defendant/Respondent

06/12/2015

Objection Document (DEFT CITY OF GLENDALE'S EVIDENTIARY OBJ TO THE DECL OF GERALD G KNAPTON) Filed by Attorney for Defendant/Respondent

06/12/2015

Reply/Response (DEFT CITY OF GLENDALE'S REPLY IN SUPP OF ITS MTN FOR ATTY'S FEES PURS TO CA CODE OF CIV PROC 425.16) Filed by Attorney for Defendant/Respondent

06/12/2015

Declaration (DECL OF STAN SIDERS MOLEVER IN SUPP OF DEFTS MTN FOR ATTY'S FEES) Filed by Attorney for Defendant/Respondent

06/12/2015

Declaration (DECL OF CHRISTOPHER S MUNSEY IN SUPP OF DEFTS MTN FOR ATTY'S FEES) Filed by Attorney for Defendant/Respondent

06/04/2015

Notice of Designation of Record Filed by Attorney for Defendant/Respondent

06/01/2015

Declaration (of Gerald G. Knapton, Esq. in support of pltfs' opposition to deft's motion for attor-

neys' fees & costs;) Filed by Attorney for Pltf/Petnr

06/01/2015

Opposition Document (to motion for attorney's fees & costs;) Filed by Attorney for Pltf/Petnr

05/21/2015

Ntc to Atty re Notice of Appeal Filed by Clerk

05/20/2015

Notice of Appeal Filed by Attorney for Appellant

05/20/2015

Notice of Designation of Record Filed by Attorney for Appellant

05/18/2015

Stipulation and Order (TO SET BRIEFING SCHEDULE FOR AND MOVE HEARING DATE ON DEFT'S MOTION FOR ATTORNEY FEES U.S. MAIL) Filed by Attorney for Plaintiff/Petitioner

05/05/2015

Notice of Entry of Judgment Filed by Court

05/04/2015

Declaration (3) Filed by Attorney for Defendant/Respondent

05/04/2015

Notice of Motion (FEES 5/27/15) Filed by Attorney for Defendant/Respondent

05/04/2015

Judgment Filed by Attorney for Defendant/Respondent

05/04/2015
Notice of Motion (RE FEES 5/27/15) Filed by Attorney for Defendant/Respondent

05/04/2015
Declaration (36) Filed by Attorney for Defendant/Respondent

05/04/2015
Proof of Service Filed by Attorney for Defendant/Respondent

03/25/2015
Notice (OF ORDER) Filed by Attorney for Defendant/Respondent

03/20/2015
Request (TO PERMIT COVERAGE) Filed by Interested Party

03/20/2015
Order (DENYING REQUEST TO PERMIT COVERAGE) Filed by Court

03/20/2015
Declaration Filed by Attorney for Plaintiff/Petitioner

03/13/2015
Order (RE THE GRANTING OF DEFENDANTS' SPECIAL MOTION TO STRIKE U.S. MAIL) Filed by Attorney for Defendant/Respondent

02/23/2015
Ord-Appt Apprv Rptr as Rptr protem (RE ANGELA GONZALEZ/CSR #11612) Filed by Attorney for Defendant/Respondent

02/13/2015
Reply/Response (TO OBJ) Filed by Attorney for Plaintiff/Petitioner

02/13/2015
Proof of Service (CORRECTED) Filed by Attorney for Defendant/Respondent

02/11/2015
Reply/Response (TO JUDICAL NTC) Filed by Attorney for Defendant/Respondent

02/11/2015
Objection Document Filed by Attorney for Defendant/Respondent

02/11/2015
Proof of Service Filed by Attorney for Defendant/ Respondent

02/11/2015
Reply/Response Filed by Attorney for Defendant/ Respondent

02/06/2015
Statement-Case Management Filed by Attorney for Defendant/Respondent

02/06/2015
Statement-Case Management Filed by Attorney for Plaintiff/Petitioner

01/28/2015
Opposition Document (2) Filed by Attorney for Plaintiff/Petitioner

01/28/2015
Notice of Lodging Filed by Attorney for Plaintiff/ Petitioner

01/28/2015
Declaration (4) Filed by Attorney for Plaintiff/ Petitioner

01/14/2015
Declaration (2) Filed by Attorney for Defendant/ Respondent

01/14/2015
Request for Judicial Notice Filed by Attorney for Defendant/Respondent

01/14/2015
Proof of Service Filed by Attorney for Defendant/ Respondent

01/14/2015
Motion to Strike Filed by Attorney for Defendant/Respondent

01/07/2015
Miscellaneous-Other (COURT'S WRITTEN RULING GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT;) Filed by Court

01/07/2015
Second Amended Complaint Filed by Attorney for Plaintiff/Petitioner

01/07/2015
Proof of Service Filed by Attorney for Plaintiff/ Petitioner

12/30/2014
Declaration (in suppt of reply 2) Filed by Attorney for Plaintiff/Petitioner

12/22/2014

Proof of Service Filed by Attorney for Defendant/ Respondent

12/22/2014

Opposition Document Filed by Attorney for Defendant/Respondent

12/22/2014

Declaration Filed by Attorney for Defendant/ Respondent

12/11/2014

Opposition Document (TO PLAINTIFFS' EX PARTE APPLICATION) Filed by Attorney for Defendant/Respondent

12/11/2014

Ex-Parte Application (TO ADVANCE CASE MANAGEMENT CONFERENCE DATE; AND FOR AN ORDER ALLOWING BOTH PARTIES TO FILE OVERSIZED MEMORANDA) Filed by Attorney for Plaintiff/Petitioner

12/02/2014

Ex-Parte Application (TO STAY PROCEEDINGS, OR IN THE ALTERNATIVE, FOR AN ORDER SHORTENING TIME TO HEAR MOTON TO STAY, AN ORDER CONTINUING DEFT'S ANTI-SLAPP MOITON AND AN ORDER ALLOWING PLAINTIFF TO FILE OVERSIZED MEMO.) Filed by Attorney for Plaintiff/Petitioner

12/02/2014

Declaration (IN SUPPORT OF OPPOSITION) Filed by Attorney for Defendant/Respondent

12/02/2014
Proof of Service Filed by Attorney for Defendant/ Respondent

12/02/2014
Ord-Appt Apprv Rptr as Rptr protem (RE YVETTE M. BONILLA/CSR #13175) Filed by Attorney for Defendant/Respondent

12/02/2014
Opposition Document (TO PLAINTIFFS' EX PARTE APPLICATION FOR AN ORDER STAYING ACTION) Filed by Attorney for Defendant/Respondent

11/14/2014
Substitution of Attorney Filed by Attorney for Plaintiff/Petitioner

11/07/2014
Proof of Service Filed by Attorney for Plaintiff/ Petitioner

10/31/2014
Proof of Serv of Ntc by Mail Filed by Attorney for Defendant/Respondent

10/24/2014
Proof of Service Filed by Attorney for Defendant/ Respondent

10/23/2014
Request for Judicial Notice Filed by Attorney for Defendant/Respondent

10/23/2014
Motion to Strike (1/15/15) Filed by Attorney for Defendant/Respondent

10/23/2014
Declaration (2) Filed by Attorney for Defendant/ Respondent

10/22/2014
Motion for Leave (1/7/15) Filed by Attorney for Plaintiff/Petitioner

10/22/2014
Declaration Filed by Attorney for Plaintiff/ Petitioner

09/22/2014
Notice-Case Management Conference Filed by Clerk

09/18/2014
First Amended Complaint Filed by Attorney for Plaintiff/Petitioner

09/18/2014
Summons Filed Filed by Attorney for Plaintiff/Petitioner

09/03/2014
Complaint

08/25/2015
at 08:35 am in Department 34, Michael P. Linfield, Presiding Motion for Attorney Fees—Court makes order

05/27/2015
at 08:31 am in Department 34, Michael P. Linfield, Presiding Motion for Attorney Fees—Continued by Stipulation

04/28/2015

at 08:30 am in Department 34, Michael P. Linfield, Presiding Order to Show Cause (RE JUDGMENT;C/F 3/24/15)—OSC Discharged

03/24/2015

at 08:30 am in Department 34, Michael P. Linfield, Presiding Order to Show Cause (RE JUDGMENT)—Matter continued

02/23/2015

at 08:35 am in Department 34, Michael P. Linfield, Presiding Motion to Strike—Granted

01/15/2015

at 08:31 am in Department 34, Michael P. Linfield, Presiding Motion to Strike—Matter continued

01/07/2015

at 08:31 am in Department 34, Michael P. Linfield, Presiding Motion for Leave (AMEND F/A/C)—Granted

12/11/2014

at 08:30 am in Department 34, Michael P. Linfield, Presiding Ex Parte Motion—Granted

12/02/2014

at 08:30 am in Department 34, Michael P. Linfield, Presiding Exparte proceeding—Denied

EX PARTE APPLICATION TO STAY PROCEEDINGS, OR IN THE ALTERNATIVE, FOR AN ORDER SHORTENING TIME TO HEAR MOTION TO STAY, AN ORDER CONTINUING DEFENDANT'S ANTI-SLAPP MOTION, AND AN ORDER ALLOWING PLAINTIFFS TO FILE OVERSIZED MEMORANDUM; DECLARATION OF DONALD R. PEPPERMAN IN SUPPORT THEREOF (DECEMBER 2, 2014)

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MICHIKO SHIOTA GINGERY, an Individual, KOICHI MERA, an Individual, GAHT-US CORPORATION, a California non-Profit Corporation; and MASATOSHI NAOKI, an Individual,

Plaintiffs,

v.

CITY OF GLENDALE, a Municipal Corporation, and DOES 1 Through 20, Inclusive,

Defendants.

Case No.: BC556600

(Assigned for all purposes to Hon. Michael Linfield, Dept. 34)

TO THIS HONORABLE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 2, 2014 at 8:30 a.m., or as soon thereafter as counsel may be heard in Courtroom 34 of the above-entitled Court, located at 111 N Hill Street, Los Angeles, CA 90012, Plaintiffs Michiko Shiota Gingery, Koichi Mera, GAHT-US Corporation and Masatoshi Naoki ("Plaintiffs") will move this Court for an Order staying these proceedings pending the outcome of a Ninth Circuit appeal between the same parties on substantially similar issues (Option A); or, in the alternative for: (1) an Order shortening time to hear Plaintiffs' Motion to Stay Proceedings; (2) an order continuing Defendant's Special Motion to Strike until the Motion to Stay Proceedings can be heard and long enough thereafter to permit reasonable briefing time for Defendant's Special Motion to Strike in the event that a stay is denied; and (3) for an Order allowing Plaintiffs to file a memorandum in opposition to the Anti-SLAPP Motion exceeding fifteen (15) pages (Option B).

On or about February 20, 2014, Plaintiffs filed suit in United States District Court, Central District of California requesting declaratory and injunctive relief against the Defendant City of Glendale on the same facts as the instant case. Following the dismissal of the case by the Central District, Plaintiffs filed a Notice of Appeal of the Central District's ruling, and the same day, filed the instant action to preserve the statute of limitations on Plaintiffs' state law claims. The appeal is currently pending in the United States Court of Appeals for the Ninth Circuit

("the Ninth Circuit Appeal") and involves substantially the same dispute between substantially similar parties. A ruling from the Ninth Circuit could impact, and perhaps even resolve, the instant proceedings. A stay of the instant proceedings will prevent the parties and the Court from expending time, energy and resources litigating both actions simultaneously.

Good cause exists to grant the requested relief on an *ex parte* basis because of the Court's busy docket and the short proximity in time to several significant hearings in the coming weeks. Defendant's Special Motion to Strike Plaintiff's First Amended Complaint Pursuant to Code of Civil Procedure 425.16 ("Anti-SLAPP Motion") is set to be heard by this Court on January 15, 2015. Plaintiffs' Motion for Leave to Amend the Complaint, filed concurrently with a proposed Second Amended Complaint, will be heard on January 7, 2015—the week before the Anti-SLAPP Motion—and could render Defendant's Anti-SLAPP Motion moot if granted. Without a stay, both Plaintiffs and Defendants will be forced to dedicate significant amounts of time and resources to briefing both motions. A stay of the proceedings prior to these hearings would also advance judicial economy by conserving the time and resources of the Court, as well as that of parties, and avoid the possible procedural complexities that will arise because of the order in which these motions will be heard. If the Court prefers to hear a noticed Motion to Stay, Plaintiffs respectfully request that the Court continue Defendant's Anti-SLAPP Motion until sufficiently after Plaintiffs' Motion to Stay can be heard so as to allow reasonable time to prepare and file opposition to Defendant's Anti-SLAPP Motion. Attached to this application is a copy of Plaintiffs'

Motion to Stay Proceedings, which can be filed and served upon Defendant immediately upon the granting of this Order.

This Motion will be based upon this Notice of Motion, the attached Memorandum of Points and Authorities, the complete files and records of this action, and upon such other and further argument and evidence as may be presented at the time of hearing on this Motion.

BLECHER COLLINS
PEPPERMAN & JOYE, P.C.
Maxwell M. Blecher
Donald R. Pepperman
Taylor C. Wagniere

By: /s/ Maxwell M. Blecher
Attorneys for Plaintiffs

Dated: December 1, 2014

I. Introduction

This lawsuit arises the City of Glendale's unconstitutional conduct in connection with the installation of a Public Monument in Glendale's Central Park. Plaintiffs originally filed suit for declaratory and injunctive relief in the U.S. District Court, Central District of California. (Declaration of Donald R. Pepperman ["Pepperman Decl."], ¶ 3.) The Central District dismissed the case for lack of standing, and in its Order, tolled the statute of limitations for Plaintiffs' state law claim for a period of thirty (30) days. (Pepperman Decl., ¶ 4.) Within thirty (30) days, Plaintiffs filed the instant state court case to preserve the statute of limitations on their state law claims. (*Id.*) The same day as filing the instant action, Plaintiffs also appealed the Central District's ruling to the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit Appeal"). (Pepperman Decl., ¶ 5.) The subject matter of the instant action and the Ninth Circuit Appeal are similar and a ruling in the Ninth Circuit may directly impact these proceedings and possibly eliminate the need for these proceedings entirely. (Pepperman Decl., ¶ 3, 5.)

Plaintiffs' current counsel was substituted into this matter on November 14, 2014. (Pepperman Decl., ¶ 6.) Shortly thereafter, Plaintiffs' counsel notified Defendant's counsel via letter that Plaintiffs intended to seek a stay of the state court proceedings given the similarity between the concurrent state and federal cases, and inquired if Defendant would stipulate to a stay. (Pepperman Decl., ¶ 7; Exhibit B.) Despite the fact that a stay would conserve the resources of the parties and the Court and promote judicial economy, Defendant declined to stipulate. (Pepperman Decl.,

¶ 8.) Without a stay, the parties and the Court will spend significant time, energy and resources briefing the motions on currently calendar and litigating an action that may be unnecessary and duplicative in light of the Ninth Circuit Appeal. As such, Plaintiffs request *ex parte* relief to stay these proceedings before the hearings on Plaintiffs' Motion for Leave to Amend the Complaint, set for January 7, 2015, and Defendant's Special Motion to Strike Pursuant to Code of Civil Procedure 425.16 ("Anti-SLAPP Motion"), set for January 15, 2015. (Pepperman Decl., ¶ 9.) In the event that the Court prefers to hear Plaintiffs' Motion to Stay Proceedings at a noticed hearing, Plaintiffs respectfully request that the Court issue an Order shortening time to hear Plaintiffs' Motion for Stay, and continue Defendant's Anti-SLAPP Motion until the Motion to Stay Proceedings can be heard and long enough thereafter to permit reasonable briefing time for Defendant's Anti-SLAPP Motion in the event that a stay is denied.

II. *Ex Parte* Relief Is Required Under the Circumstances

The Court may issue an order *ex parte* based on affirmative evidence that the party applying for the relief will suffer irreparable harm if the matter is delayed until it can be heard as a regularly noticed motion. "An applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief *ex parte*." Cal. Rules of Court, Rule 379(b).

Here, *ex parte* relief is warranted for numerous reasons. First, without an immediate stay, the Court will be required to expend judicial resources preparing for and hearing Plaintiffs' Motion for Leave to Amend and Defendant's Anti-SLAPP Motion—as well as the entirety of this case—when there is already federal litigation pending that could resolve this matter. Second, the parties will be forced to expend considerable resources preparing for and opposing these motions if a stay is not ordered prior to the upcoming hearings. Additionally, Plaintiffs' Motion for Leave to Amend attached a Second Amended Complaint and requested that the Second Amended Complaint be deemed filed and served as of the date that leave is granted. (Pepperman Decl., ¶ 9.) Therefore, if granted, Plaintiffs' Motion for Leave to Amend will render Defendant's Anti-SLAPP Motion moot, and the parties and the Court will be forced to expend further time and resources when Defendant files a second Anti-SLAPP Motion responsive to the claims in the Second Amended Complaint. The expenditure of time, money and resources for parties and the Court can be avoided by instituting a stay of these proceedings pending the outcome of the Ninth Circuit appeal. Because of the Court's busy docket, Plaintiffs' Motion to Stay could not be heard until well after the currently-scheduled hearings[1] and the parties would be forced to allocate considerable time and resources to litigate this case in the meantime without *ex parte* relief.

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[1] On December 1, 2014, the Court's next available hearing date was not until January 30, 2015. (Pepperman Decl., ¶ 10.) This is more than two weeks after Defendant's Anti-SLAPP Motion is set to be heard.

III. The Court Has Authority to Stay These Proceedings

It is well established that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.* (1936) 299 U.S. 248, 254. A trial court has the power to provide for the orderly conduct of the proceedings before it, and to control its process to conform to law and justice. Code Civ. Proc., § 128, subds. (a)(3), (8). As such, "courts generally have the inherent power to stay proceedings in the interest of justice and to promote judicial efficiency." *Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489 (citations omitted).

In particular, "[g]ranting a stay in a case where the issues in two actions are substantially identical is a matter addressed to the sound discretion of the trial court." *Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 745 (footnote and citation omitted). In determining whether to issue a stay, the court must examine "importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions," and "whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced." *Id.*

As discussed more fully in Plaintiffs' Motion to Stay, attached hereto in the Declaration of Donald R. Pepperman as Exhibit A, staying these proceedings

is in the best interests of the parties and the Court given that a Ninth Circuit ruling may directly impact the state court litigation and possibly obviate the need for these proceedings entirely. *Anthony v. General Motors Corp.* (1973) 33 Cal.App.3d 699, 708 ("[I]f a trial court feels that disposition of the other action may obviate the necessity for trial of the action before it, or may substantially shorten that trial, [the proper course] is to continue the action before it[.]").

Similarly, a stay will promote judicial economy by conserving the resources of the parties and the Court while litigation continues on the federal level where the proceedings been occurring for nearly a year and have reached a more advanced stage. Furthermore, because both actions seek the same declaratory and injunctive relief, a stay will avoid duplicative litigation and the potential for conflicting rulings on the same issues. *Freiberg*, 33 Cal.App.4th at 1489 ("Trial courts generally have the inherent power to stay proceedings . . . to promote judicial efficiency."); *Rivers v. Walt Disney Co.* (C.D. Cal. 1997) 980 F.Supp. 1358, 1360 (when ruling on a stay, courts should consider "the judicial resources that would be saved by avoiding duplicative litigation[.]").

To the extent that Defendant objects to a stay of the instant action while Defendant's Anti-SLAPP motion is on calendar, a stay will conserve Defendant's time and resources in a manner consistent with the purposes the anti-SLAPP statute. *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 ("[S]ection 425.16 seeks to limit the costs of defending against such a lawsuit."). A stay would also conserve the parties' resources based on the fact that the two

motions currently on calendar in the instant action—Plaintiffs' Motion for Leave to Amend and Defendant's Anti-SLAPP Motion—have not yet been fully briefed. Without a stay, the parties will be forced to expend substantial time and energy to draft oppositions and replies, and the Court will have to expend time and judicial resources to consider the merits of these papers. Moreover, because Plaintiffs' Motion for Leave to Amend was filed first, and is set to be heard the week prior to Defendant's Anti-SLAPP Motion, it is possible that the ruling on the Motion for Leave to Amend renders the Anti-SLAPP Motion moot. A stay of proceedings will not only avoid the possible procedural complexities that could arise because of the order in which these motions will be heard, but will also eliminate the need for Defendants to spend *additional* time and resources drafting and filing a new anti-SLAPP Motion based on the Second Amended Complaint.

For the reasons set forth herein, and the reasons more fully briefed in the attached Motion to Stay Proceedings, Plaintiffs respectfully request that in the interests of justice and judicial efficiency, the state court proceedings be stayed pending the outcome of the concurrent Ninth Circuit appeal.

IV. In the Alternative, the Court Has Authority to Shorten Time for Notice and Hearing of the Motion to Stay, and to Continue Defendant's Anti-SLAPP Motion

Code Civ. Proc. § 1005 prescribes the times for written notice of motions and for the service and filing of supporting and opposing papers. Code of Civil Procedure section 1005(b), however, provides

that "[t]he court, or a judge thereof, may prescribe a shorter time" than otherwise prescribed in § 1005. In addition, California Rules of Court, Rule 3.1300(b) states:

> The court, on its own motion or on application for an order shortening time supported by a declaration showing good cause, may prescribe shorter times for the filing and service of papers than the time specified in Code of Civil Procedure section 1005.

In the event that Defendant's attorneys or the Court need additional time to consider a stay of these proceedings, the Court may avoid the unnecessary expenditure of both the parties' and the Court's resources by issuing an order shortening time for a noticed hearing to be held at the Court's convenience, and continuing Defendant's Anti-SLAPP Motion until after said hearing. Attached to this application is a copy Plaintiffs' Motion to Stay Proceedings, which can be filed and served upon Defendant immediately upon the granting of this Order.

V. The Complexities of This Case Require a Memorandum in Opposition to the Anti-SLAPP Motion Longer Than the Fifteen Page Limit

If the Court decides not to stay these proceedings, Plaintiffs respectfully request leave from the Court to file an oversized memorandum in opposition to Defendant's Anti-SLAPP Motion, which is due January 2, 2015. Rules of Court, Rule 3.1113 limits all motions and oppositions to fifteen (15) pages, but provides that "a party may apply to the court *ex parte* but with written notice of the application to the other parties, at least 24 hours before the memorandum is

due, for permission to file a longer memorandum. The application must state reasons why the argument cannot be made within the stated limit."

Here, the constitutional violations alleged against Defendant are numerous and complex. Plaintiffs' counsel will make every effort to prepare and file a concise Memorandum with the least number of pages possible, but currently estimate that a complete discussion of the issues raised in Defendants' Anti-SLAPP Motion will require 20 pages. (Pepperman Decl., ¶ 11.) The ramifications of an anti-SLAPP motion are harsh—akin to a summary judgment motion—but anti-SLAPP oppositions are limited to fifteen (15) pages rather than the twenty (20) page limit for summary judgment oppositions. Justice requires that Plaintiffs be afforded an opportunity to fully present their case given the risk of dismissal and the possibility for an order awarding Defendant's attorneys' fees under the anti-SLAPP statute.[2]

Accordingly, Plaintiffs respectfully request that they be permitted to file a Memorandum in Opposition to Defendant's Anti-SLAPP Motion law not to exceed 20 pages.

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[2] After receiving *ex parte* notice of the instant application, Defendant indicated a willingness to stipulate to a page increase for Plaintiffs' Opposition if Defendant was granted a similar increase for its Reply. Plaintiffs responded that they would agree to an increase of Defendant's Reply from 10 pages to 13 pages, which is the same one-third proportion as Plaintiffs' requested increase from 15 pages to 20 pages. At the time this Motion was finalized, Defendants had not yet responded to Plaintiffs' proposed increases. (Pepperman Decl., ¶ 11.)

VI. Counsel Has Fully Complied with California Rules of Court Regarding *Ex Parte* Applications

Among other provisions, Rules of Court, Rule 3.1203 provides as follows:

> A party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice.

California Rules of Court, rule 3.1203(a).

An *ex parte* application must also be accompanied by a declaration stating the date, time and mariner of notice given to the parties and the nature of the relief sought. Rules of Court, Rule 3.1204(b).

Plaintiffs duly complied with the notice requirements by notifying Defendants' counsel of the instant *ex parte* application via fax and email on December 1, 2014 at 9:29 a.m. (Pepperman Decl., ¶ 12.)

VII. Conclusion

In view of the foregoing facts and authorities, and the matters set forth in the attached Declaration, Plaintiffs respectfully request an Order staying these proceedings pending the outcome of the Ninth Circuit Appeal (Option A); or, in the alternative for: (1) an Order shortening time to hear Plaintiffs' Motion to Stay Proceedings; (2) an order continuing Defendant's Special Motion to Strike until the Motion to Stay Proceedings can be heard and long enough thereafter to permit reasonable briefing time for Defendant's Special Motion to Strike in the event that a stay is denied; and (3) for an Order allowing Plaintiffs to file

a memorandum in opposition to the Anti-SLAPP Motion exceeding fifteen (15) pages (Option B).

BLECHER COLLINS
PEPPERMAN & JOYE, P.C.
Maxwell M. Blecher
Donald R. Pepperman
Taylor C. Wagniere

By: /s/ Maxwell M. Blecher
Attorneys for Plaintiffs

Dated: December 1, 2014

DECLARATION OF DONALD R. PEPPERMAN (DECEMBER 1, 2014)

I, Donald R. Pepperman, hereby declare and state as follows:

1. I am an attorney licensed to practice before all Courts in the State of California and admitted to practice before this Court. I am a member of good standing of the Bar of the State of California and a shareholder in the law firm of Blecher Collins, Pepperman & Joye P.C., counsel for Plaintiffs Michiko Shiota Gingery, Koichi Mera, GAHT-US Corporation and Masatoshi Naoki.

2. I submit this Declaration in support of Plaintiffs' *Ex Parte* Application to Stay Proceedings. I have personal knowledge of the facts and circumstances set forth below and related herein. If called as a witness, I could and would competently testify thereto.

3. On or about February 20, 2014, Plaintiffs filed suit in United States District Court, Central District of California requesting declaratory and injunctive relief against the City of Glendale on similar facts as the instant case.

4. On or about August 4, 2014, the Central District dismissed the case with prejudice on the grounds that Plaintiffs lacked standing. In its Order, the Court tolled the statute of limitations for Plaintiffs' state law claim for a period of thirty (30) days. On or about September 3, 2014, Plaintiffs filed the instant action to preserve the statute of limitations on their state law claims.

5. On or about September 3, 2014, Plaintiffs filed a Notice of Appeal of the Central District's ruling.

This appeal is currently pending in the United States Court of Appeals for the Ninth Circuit, as case no. 14-56440, entitled *Michiko Gingery, et al v. City of Glendale*.

6. On or about November 14, 2014, Plaintiffs filed a Notice of Substitution substituting in my office and the Law Offices of Ronald S. Barak as current counsel in this matter.

7. On November 20, 2014, my office sent a letter stating that Plaintiffs intended to seek a stay of the state court proceedings and inquiring if Defendant would stipulate to such a stay. A true and correct copy of Plaintiffs' Motion to Stay Proceedings is attached hereto as Exhibit A and incorporated by reference. Also attached is a true and correct copy of the November 20, 2014 letter as Exhibit B and incorporated by reference.

8. In a telephone conference on or about November 21, 2014, Defendant declined to stipulate to a stay, instead requesting that Plaintiffs dismiss the state court action with prejudice. Plaintiffs' counsel explained that this may later bar Plaintiffs' state claims under the statute of limitations in the event that the Ninth Circuit issues an adverse ruling.

9. Defendant's Anti-SLAPP Motion will be heard by this Court on January 15, 2015. Plaintiffs' Motion for Leave to Amend the Complaint is currently set to be heard on January 7, 2015, or eight (8) days prior to the Anti-SLAPP Motion. Plaintiffs' Motion for Leave to Amend attached a Second Amended Complaint and requested that the Second Amended Complaint be deemed filed and served as of the date

that leave is granted. Therefore, if granted, Defendant's Anti-SLAPP Motion will be rendered at least partially moot by Plaintiffs' Motion for Leave to Amend. nonetheless, because of the short time span between motions, both parties will expend time and resources briefing the motions even if. Defendant's Anti-SLAPP Motion is rendered moot. In addition, Plaintiffs are informed and believe that Defendant is likely to file a second Anti-SLAPP Motion responsive to the claims in the Second Amended Complaint.

10. On December 1, 2014, my office called Department 34 to see how soon the Court could hear Plaintiffs' Motion to Stay Proceedings. Plaintiffs were advised that the Court's next available hearing date was not until January 30, 2015—more than two weeks after the hearing dates for the motions currently on calendar.

11. The preliminary draft of Plaintiffs' Opposition to the Anti-SLAPP Motion is already nearing the fifteen (15) page limit. Plaintiffs' counsel estimates that a full discussion of the complex factual and legal issues raised in the Anti-SLAPP Motion will require 20 pages. After receiving *ex parte* notice of the instant application, Defendant indicated a willingness to stipulate to a page increase for Plaintiffs' Opposition if Defendant was granted a similar increase for its Reply. Plaintiffs responded that they would agree to an increase of Defendant's Reply from 10 pages to 13 pages, which is the same one-third proportion as Plaintiffs' requested increase from 15 pages to 20 pages. At the time this Motion was finalized, Defendants had not yet responded to Plaintiffs' proposed increases.

12. On December 1, 2014 at 9:29 a.m., my office notified Defendant's counsel of the instant *ex parte*

application in an email that included the time and date of the *ex parte* hearing, the relief requested, and an inquiry as to whether Defendant would appear or file an opposition. A true and correct copy of this correspondence is attached hereto as Exhibit C and incorporated by reference.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 1st day of December 2014, at Los Angeles, California.

/s/ Donald R. Pepperman

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO STAY PROCEEDINGS; DECLARATION OF DONALD R. PEPPERMAN IN SUPPORT THEREOF (DECEMBER 1, 2014)

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MICHIKO SHIOTA GINGERY, an Individual, KOICHI MERA, an Individual, GAHT-US CORPORATION, a California non-Profit Corporation; and MASATOSHI NAOKI, an Individual,

Plaintiffs,

v.

CITY OF GLENDALE, a Municipal Corporation, and DOES 1 Through 20, Inclusive,

Defendants.

Case No.: BC556600

(Assigned for all purposes to Hon. Michael Linfield, Dept. 34)

TO THIS HONORABLE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on _____ at 8:30 a.m., or as soon thereafter as counsel may be heard in Courtroom 34 of the above-entitled Court, located at 111 N Hill Street, Los Angeles, CA 90012, Plaintiffs Michiko Shiota Gingery, Koichi Mera, GAHT-US Corporation and Masatoshi Naoki ("Plaintiffs") will move this Court for an Order staying this action until the outcome of a currently-pending appeal in the United States Court of Appeals for the Ninth Circuit.

On or about February 20, 2014, Plaintiffs filed suit in United States District Court, Central District of California requesting declaratory and injunctive relief against the Defendant City of Glendale on the same facts as the instant case. On or about August 4, 2014, the Central District dismissed the case with prejudice on the grounds that Plaintiffs lacked standing. In its Order, the Court tolled the statute of limitations for Plaintiffs' state law claim for a period of thirty (30) days. As a result, on or about September 3, 2014, Plaintiffs filed the instant action to preserve the statute of limitations on their state law claims.

The same day as filing the instant action, Plaintiffs filed a Notice of Appeal of the Central District's ruling. The appeal is currently pending in the United States Court of Appeals for the Ninth Circuit as case no. 14-56440, entitled *Michiko Gingery, et al v. City of Glendale* ("the Ninth Circuit Appeal"). The Ninth Circuit Appeal involves the same dispute based on the same facts and is between substantially similar

parties.[1] A ruling from the Ninth Circuit would undoubtedly impact, and perhaps even resolve, the instant proceedings. Without a stay of the state court proceedings, the parties and the Court will be forced to expend time, energy and resources that could be avoided by litigating this matter in the already-pending Ninth Circuit Appeal. Accordingly, a stay of all proceedings in the pending action would advance judicial economy by conserving the time and resources of the Court, as well as that of parties, until an adjudication is made by the Ninth Circuit.

This Motion will be based upon this Notice of Motion, the attached Memorandum of Points and Authorities, the complete files and records of this action, and upon such other and further argument and evidence as may be presented at the time of hearing on this Motion.

BLECHER COLLINS
PEPPERMAN & JOYE, P.C.
Maxwell M. Blecher
Donald R. Pepperman
Taylor C. Wagniere

By: /s/ Maxwell M. Blecher
Attorneys for Plaintiffs

Dated: December 1, 2014

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[1] Plaintiff Masatoshi Naoki was added in the instant state court and is not a party in the Ninth Circuit Appeal. The Ninth Circuit Appeal requests declaratory and injunctive relief against Glendale, which, if granted, would benefit Plaintiff Naoki equally as the other Plaintiffs. Mr. Naoki's absence from the Ninth Circuit Appeal should not weigh against staying these proceedings.

Memorandum of Points and Authorities

I. Introduction

Plaintiffs Michiko Shiota Gingery, Koichi Mera, GAHT-US Corporation and Masatoshi Naoki ("Plaintiffs") bring this Motion to Stay Proceedings on the grounds there is a pending appeal in the United States Court of Appeals for the Ninth Circuit involving nearly identical parties and based on the same underlying facts. A ruling from the Ninth Circuit in this concurrent matter would impact the instant proceedings, and could obviate the need for these proceedings entirely. Until such time that the Ninth Circuit rules, these proceedings should be stayed to conserve the resources of the parties and the Court, and to avoid the possibility of conflicting or duplicative litigation.

On or about February 20, 2014, Plaintiffs filed suit in United States District Court, Central District of California requesting declaratory and injunctive relief against the Defendant City of Glendale on similar facts as the instant case. (Declaration of Donald R. Pepperman ["Pepperman Decl."], ¶ 3.) On or about August 4, 2014, the Central District dismissed the case with prejudice on the grounds that Plaintiffs lacked standing. (Pepperman Decl., ¶ 4.) In its Order, the Court tolled the statute of limitations for Plaintiffs' state law claim for a period of thirty (30) days. (*Id.*) On September 3, 2014, Plaintiffs filed a Notice of Appeal of the Central District's ruling. (*Id.*) The same day, Plaintiffs filed the instant action to preserve the statute of limitations on their state law claims. (Pepperman Decl., ¶ 5.) The appeal is currently pending in the United States Court of Appeals for the Ninth

Circuit, as case no. 14-56440, entitled *Michiko Gingery, et al v. City of Glendale* ("Ninth Circuit Appeal"). (*Id.*)

A stay of the instant proceedings is appropriate at this juncture to conserve judicial resources in light of the number of upcoming hearings on motions filed by both Plaintiffs and Defendant. Defendant's Special Motion to Strike Plaintiffs' First Amended Complaint Pursuant to Code of Civil Procedure 425.16 ("Anti-SLAPP Motion") is currently set to be heard by this Court on January 15, 2015. (Pepperman Decl., ¶ 9.) Plaintiffs' Motion for Leave to Amend the Complaint ("Motion for Leave to Amend"), filed concurrently with a proposed Second Amended Complaint, will be heard on January 7, 2015—the week before the Anti-SLAPP Motion. (*Id.*) Because Plaintiffs' Motion for Leave to Amend was filed first and will be heard before Defendant's Anti-SLAPP Motion, it is possible that Defendant's Anti-SLAPP Motion will be rendered moot if Plaintiffs' Motion for Leave to Amend is granted. (*Id.*) A stay of the proceedings prior to these hearings would advance judicial economy by conserving the time and resources of the Court as well as the parties given that these motions are not yet fully briefed. Additionally, a stay will not only avoid the possible procedural complexities that could arise because of the order in which these motions will be heard, but will also eliminate the need for Defendants to spend <u>additional</u> time and resources drafting and filing a new anti-SLAPP Motion based on the Second Amended Complaint.

A stay will also avoid the high probability of both duplicative litigation and conflicting rulings on substantially similar matters between the instant

proceedings and the Ninth Circuit Appeal. Because the instant action was filed to preserve the statute of limitations on Plaintiffs' state law claims pursuant to the Central District's Order, it should not be necessary for the parties to litigate in both courts, especially given that a final ruling on the merits in one action may resolve the other action. Based on these concerns, shortly after Plaintiffs' current counsel was substituted into this matter on November 14, 2014, Plaintiffs' counsel notified Defendant via letter that Plaintiffs intended to seek a stay of the state court proceedings given the similarity between the concurrent state and federal cases. (Pepperman Decl., ¶¶ 6, 7.) Despite the fact that a stay would reduce Defendant's costs and promote judicial economy, Defendant declined to stipulate to a stay. (Pepperman Decl., ¶ 8.)

Accordingly, Plaintiffs respectfully request that the Court stay all proceedings in this matter until the resolution of the Ninth Circuit Appeal.

II. The Legal Standard Applicable to a Motion to Stay

It is well established that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.* (1936) 299 U.S. 248, 254. A trial court has the power to provide for the orderly conduct of the proceedings before it, and to control its process to conform to law and justice. Code Civ. Proc., § 128, subds. (a)(3), (8). As such, "courts generally have the inherent power to stay proceedings in the interest of justice and to promote judicial efficiency." *Freiberg v.*

City of Mission Viejo (1995) 33 Cal.App.4th 1484, 1489 (citations omitted); *Ellis v. Roshei Corp.* (1983) 143 Cal.App.3d 642, 648- 649 ("A trial court is empowered to exercise its supervisory power in such a manner as to provide for the orderly conduct of the court's business[.]"); *Adamson v. Superior Court* (1980) 113 Cal.App.3d 505, 509 ("Courts are not powerless to formulate rules of procedure where justice demands it."); *Santandrea v. Siltec Corp.* (1976) 56 Cal.App.3d 525, 529 ("Every court has the inherent power to regulate the proceedings of matters before it and to effect an orderly disposition of the issues presented."); *Mowrer v. Superior Court* (1969) 3 Cal.App.3d 223, 230 ("A court has inherent power to exercise reasonable control over all proceedings connected with the litigation before it.")

In particular, "[g]ranting a stay in a case where the issues in two actions are substantially identical is a matter addressed to the sound discretion of the trial court." *Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 745 (footnote and citation omitted). As the California Supreme Court stated:

> In exercising its discretion the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced.

Id.

It is also a matter of discretion for a state court to stay its proceedings in light of a concurrent federal action. *Id.* at 748.

Here, a stay of these proceedings is in the interests of judicial economy because it will avoid possibly duplicative litigation and the potential for conflicting rulings, promote judicial efficiency by conserving the resources of the parties and the Court, and serve the interests of the parties by litigating in a matter where the proceedings have already reached a more advanced stage.

III. A Stay Will Avoid the Risk of Conflicting Rulings and Duplicative Litigation

On the basis on comity and public policy, California courts must avoid "unseemly conflicts" with other courts. *Thomson*, 66 Cal.2d at 745; *Gregg v. Superior Court* (1987) 194 Cal.App.3d 134, 136 ("[T]he principle of comity may call for a discretionary refusal of the court to entertain the second suit pending determination of the first-filed action."); *Simmons v. Superior Court* (1950) 96 Cal.App.2d 119, 124. This is especially true when two actions are between the same parties, involve the same subject matter, and one action could be determinative of the issues in the other action. *Simmons*, 96 Cal.App.2d at 122-23 ("It is settled California law that the pendency of a prior action in a court of competent jurisdiction, predicated on the same cause of action and between the same parties, constitutes good ground for abatement of a later action[.]"). In situations where one suit may resolve another, the suit filed second generally must be stayed pending the outcome of the first action. *Id.* at

123-24 ("[T]he principle of comity . . . calls for the refusal on the part of the courts of this state to proceed to a decision before the termination of the prior action[.]"). Although the stage of the proceedings of each case can be considered, it is not determinative, and a continuance or stay may be appropriate regardless of the stage of the litigation in each. *See e.g.*, *Margolis v. Superior Court* (1957) 151 Cal.App.2d 333, 338-339 (where pending appeal in first action would decide whether equipment was affixed to realty or not, trial court properly exercised discretion and postponed trial in second action until appeal was concluded.)

Although the instant proceedings were filed the same day as the Ninth Circuit Appeal was filed, the proceedings in the Ninth Circuit are significantly farther advanced given the amount and depth of litigation that has already transpired in this matter on the federal level over the last eleven (11) months. In fact, Defendants already filed an anti-SLAPP motion with the Central District, and many of the same operative facts and legal points that will be at issue in the instant action have already been raised or addressed on the federal level, and will be considered by the Ninth Circuit on appeal. For this reason, it highly possible that, without a stay, the parties may be subject to contradictory rulings on the same issues. In fact, given that the same declaratory and injunctive relief is requested in both actions, "[t]he potential for 'unseemly conflict' is great, unless both forums should reach the exact same resolution of the issues." *Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 807.

Even if this Court and the Ninth Circuit reach the same final resolution, the duplicity of issues between both actions will be confusing to the parties and raise issues of collateral estoppel, especially if the courts rule on the same legal questions in a different order or at different times (*i.e.* standing). Because the causes of action vary between the instant proceedings (based largely on the California Constitution) and the Ninth Circuit Appeal (based largely on the U.S. Constitution), it is unclear whether and to what extent principles of collateral estoppel would apply between the two actions. Case law makes clear, however, that to the extent that legal issues determined in the Ninth Circuit Appeal may have preclusive effect, allowing those issues to be fully litigated stands to shorten or limit the issues litigated in this case. In fact, it is widely recognized that a continuance or stay of an action is appropriate when the outcome of one action could partially determine or reduce litigation in another action. *Anthony v. General Motors Corp.* (1973) 33 Cal.App.3d 699, 708 ("[I]f a trial court feels that disposition of the other action may obviate the necessity for trial of the action before it, or may substantially shorten that trial, [the proper course] is to continue the action before it[.]").

As a result, the Court should order a stay of these proceedings to avoid duplicative litigation and the possibility of conflicting rulings.

IV. A Stay Will Conserve Resources, Time and Expense for the Parties and the Court

Courts often stay proceedings when it promotes judicial economy and avoids the expenditure of time and resources for the parties as well as the Court.

Freiberg, 33 Cal.App.4th at 1489 ("Trial courts generally have the inherent power to stay proceedings . . . to promote judicial efficiency."); *Rivers v. Walt Disney Co.* (C.D. Cal. 1997) 980 F.Supp. 1358, 1360 (when ruling on a stay, courts should consider "the judicial resources that would be saved by avoiding duplicative litigation[.]").

There is no doubt that a stay of the instant proceedings would be the most efficient course of action for the parties and for the Court. Given the fact that the same relief is requested in both actions, there is a possibility that a ruling in the Ninth Circuit Appeal eliminates the need for these proceedings entirely. If the parties are able to reach a resolution in the Ninth Circuit—either through litigation or settlement—the parties and the Court will have expended unnecessary and substantial resources by simultaneously litigating the instant proceedings. This can be avoided by entering a stay in the instant proceedings until the Ninth Circuit Appeal is resolved.

A stay would also conserve resources based on the fact that the two motions currently on calendar in the instant action—Plaintiffs' Motion for Leave to Amend and Defendant's Anti-SLAPP Motion—have not yet been fully briefed. Without a stay, the parties will be forced to expend considerable time and energy to draft oppositions and replies, and the Court will have to expend time and judicial resources to consider the merits of these papers. Moreover, because Plaintiffs' Motion for Leave to Amend was filed first, and is set to be heard the week prior to Defendant's Anti-SLAPP Motion, it is possible that the ruling on Motion for Leave to Amend renders the Anti-SLAPP Motion moot. A stay of proceedings will not only

avoid the possible procedural complexities that could arise because of the order in which these motions will be heard, but it will also eliminate the risk that Defendants will have to spend additional time and resources drafting and filing a new anti-SLAPP Motion responsive to Plaintiffs' Second Amended Complaint.

Although Defendant may object to a stay of these proceedings while Defendant's Anti-SLAPP Motion is on calendar, a stay of these proceedings is consistent with the anti-SLAPP statute's goals of reducing Defendant's costs and lengthy litigation. *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192 (" [S]ection 425.16 seeks to limit the costs of defending against such a lawsuit."). Furthermore, an order granting or denying an anti-SLAPP motion is immediately appealable, and automatically stays 'the lower court proceedings. *Id.*; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 80 ("[T]he Legislature amended section 425.16 in 1999 to make orders granting or denying anti-SLAPP motions immediately appealable.").

Therefore, without a stay of the state court proceedings, it is conceivable that before this matter is resolved, Defendant may have to litigate the Ninth Circuit Appeal, a state court appeal of an adverse anti-SLAPP ruling, and a state court trial. By implementing a stay, the Court would uphold the goals of the anti-SLAPP statute and reducing the amount of litigation. *Visher v. City of Malibu* (2005) 126 Cal.App.4th 364 (In the typical anti-SLAPP suit, the plaintiff "tries to wear down the other side by forcing it to spend time, money, and resources battling the SLAPP instead of the protected activity").

Accordingly, the Court should stay the all proceedings in this matter to conserve the time and resources of the parties as well as the Court.

V. The Rights of the Parties Can Be Appropriately Determined by the Ninth Circuit

The final factor that courts examine when ruling on a stay is "whether the rights of the parties can best be determined by the court of the other jurisdiction" based on the "subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced." *Thomson*, 66 Cal.2d at 745. As discussed above, the Ninth Circuit proceedings are farther advanced because litigation has already been occurring on the federal level for nearly a year, and many of the same operative facts and legal points that will be at issue in the instant action have already been raised or addressed on the federal level. Furthermore, as reflected in both the Ninth Circuit Appeal and Plaintiffs' Second Amended Complaint (attached to the Motion for Leave to Amend), a major issue in both actions is Defendant's alleged unconstitutional interference with foreign affairs under the U.S. Constitution. Because this is a claim arising under the U.S. Constitution, it possible that a federal court is better situated to hear the full range of issues bearing on this subject matter.

Additionally, the Ninth Circuit Appeal will be litigated in California. *Caiafa*, 15 Cal.App.4th at 804 ("The California Supreme Court also has isolated another critical factor favoring a stay of the state court action in favor of the Federal action, a factor which happens to be present in this case—the Federal action is pending in California, not some other state.");

Mave Enterprises, Inc. v. Travelers Indemnity Company of Connecticut (2013) 219 Cal.App.4th 1408, 1426, *as modified* (Oct. 23, 2013), *review denied* (Jan. 15, 2014) ("[T]he two cases were in the same city—Los Angeles—making both tribunals equally convenient for the parties."). Therefore, the parties will not be inconvenienced by litigating the Ninth Circuit Appeal instead of the instant action, and the location or availability of witnesses will not be impacted.

VI. Conclusion

For the reasons set forth herein, Plaintiffs respectfully requests that the Motion be granted, and an Order staying this action be entered.

BLECHER COLLINS
PEPPERMAN & JOYE, P.C.
Maxwell M. Blecher
Donald R. Pepperman
Taylor C. Wagniere

By: /s/ Maxwell M. Blecher
Attorneys for Plaintiffs

Dated: December 1, 2014

DECLARATION OF DONALD R. PEPPERMAN (DECEMBER 1, 2014)

I, Donald R. Pepperman, hereby declare and state as follows:

1. I am an attorney licensed to practice before all Courts in the State of California and admitted to practice before this Court. I am a member of good standing of the Bar of the State of California and a shareholder in the law firm of Blecher Collins, Pepperman & Joye P.C., counsel for Plaintiffs Michiko Shiota Gingery, Koichi Mera, GAHT-US Corporation and Masatoshi Naoki.

2. I submit this Declaration in support of Plaintiffs' Motion to Stay Proceedings. I have personal knowledge of the facts and circumstances set forth below and related herein. If called as a witness, I could and would competently testify thereto.

3. On or about February 20, 2014, Plaintiffs filed suit in United States District Court, Central District of California requesting declaratory and injunctive relief against the City of Glendale on the same facts as the instant case.

4. On or about August 4, 2014, the Central District dismissed the case with prejudice on the grounds that Plaintiffs lacked standing. In its Order, the Court tolled the statute of limitations for Plaintiffs' state law claim for a period of thirty (30) days. On or about September 3, 2014, Plaintiffs filed the instant action to preserve the statute of limitations on their state law claims.

5. On or about September 3, 2014, Plaintiffs filed a Notice of Appeal of the Central District's ruling.

This appeal is currently pending in the United States Court of Appeals for the Ninth Circuit, as case no. 14-56440, entitled *Michiko Gingery, et al v. City of Glendale.*

6. On or about November 14, 2014, Plaintiffs filed a Notice of Substitution substituting in my office and the Law Offices of Ronald S. Barak as current counsel for Plaintiffs in this matter.

7. On November 20, 2014, my office sent a letter to Defendant's counsel stating that Plaintiffs intended to seek a stay of the state court proceedings and inquiring if Defendant would stipulate to such a stay. A true and correct copy of this letter is attached hereto as Exhibit A and incorporated by reference.

8. In a telephone conference on or about November 21, 2014, Defendant declined to stipulate to a stay, instead requesting that Plaintiffs dismiss the state court action. Plaintiffs' counsel explained that this may later bar Plaintiffs' state claims under the statute of limitations in the event that the Ninth Circuit issues an adverse ruling.

9. Defendant's Anti-SLAPP Motion will be heard by this Court on January 15, 2015. Plaintiffs' Motion for Leave to Amend the Complaint is currently set to be heard on January 7, 2015, which is eight (8) days prior to the Anti-SLAPP Motion. Plaintiffs' Motion for Leave to Amend attached a proposed Second Amended Complaint and requested that the Second Amended Complaint be deemed filed and served as of the date that leave is granted. Therefore, if granted, Defendant's Anti-SLAPP Motion will be rendered at least partially moot by Plaintiffs' Motion for Leave to Amend. Plaintiffs are informed and believe that

Defendant is likely to file a second Anti-SLAPP Motion responsive to the claims in the Second Amended Complaint.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 1st day of December 2014, at Los Angeles, California.

/s/ Donald R. Pepperman

EMAIL FROM DONALD R. PEPPERMAN (NOVEMBER 20, 2014)

BLECHER COLLINS PEPPERMAN & JOYE
A Professional Corporation
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Via E-Mail and Facsimile

Christopher Munsey, Esq.
Frank Broccolo, Esq.
Laura Richardson, Esq.
Sidley Austin LLP
555 West Fifth Street
Los Angeles, CA 90013

Re: Gingery v. City of Glendale (BC556600)

Counsel:

This letter is to inform you that Plaintiffs, as soon as practicable, will seek a stay of the state court proceedings until the resolution of the pending Ninth Circuit appeal. Staying these proceedings is in the best interests of all parties given that a Ninth Circuit ruling may directly impact, if not render moot altogether, the state court litigation. A stay will also conserve the time and resources of the parties and the Court in a manner consistent with the purposes of California Code of Civil Procedure section 425.16. Please advise if Defendant will stipulate to a stay of

the state court proceedings. If not, Plaintiffs will proceed to seek *ex parte* relief or an order shortening time such that a stay motion can be promptly heard and a continuation of the present briefing deadlines on Defendant's Special Motion to Strike until after the stay motion can be heard and decided by the Court.

Very truly yours,

/s/ Donald R. Pepperman

DRP:llg
cc: Maxwell M. Blecher, Esq.
Ronald S. Barak, Esq.

EMAIL FROM LORELEI L. GERDINE (NOVEMBER 20, 2014)

From: Lorelei Gerdine
Sent: Thursday, November 20, 2014 4:33 PM
To: 'cmunsey@sidley.com'; 'fbroccolo@sidley.com'; 'laura.richardson@sidley.com'
Cc: Donald R. Pepperman; Maxwell M. Blecher; rbarak@rsb-law.com
Subject: Gingery v. City of Glendale—LASC Case No. BC556600
Attachments: 2014 11 20 Letter to Counsel.pdf

Attached is a letter from Mr. Pepperman regarding the above-referenced matter which is also being sent by fax.

Lorelei L. Gerdine
Assistant

Blecher Collins Pepperman & Joye

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DEFENDANT CITY OF GLENDALE'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE 425.16 (JANUARY 14, 2015)

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

MICHIKO SHIOTA GINGERY, an Individual, KOICHI MERA, an Individual, GAHT-US CORPORATION, a California non-Profit Corporation; and MASATOSHI NAOKI, an Individual,

Plaintiffs,

v.

CITY OF GLENDALE, a Municipal Corporation, and DOES 1 Through 20, Inclusive,

Defendants.

Case No.: BC556600

Assigned to: Hon. Michael Linfield

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT on February 23, 2015, at 8:30 a.m., before the Honorable Michael Paul Linfield in Department 34 of the Superior Court of the State of California for the County of Los Angeles, Stanley Mosk Courthouse, located at 111 North Hill Street, Los Angeles, California, Defendant City of Glendale (the "City") will and hereby does move pursuant to California Code of Civil Procedure § 425.16 to strike Plaintiffs Michiko Shiota Gingery, Koichi Mera, Masatoshi Naoki, and GAHT-US Corporation's ("Plaintiffs") Second Amended Complaint on the following grounds:

1. Plaintiffs' entire case seeks to overturn the City's placement in a public park of a monument that honors certain victims of war crimes (the "Monument"), thereby squelching the message the monument conveys. The City's expressive conduct of installing the Monument in a public park occurred following a public meeting of the City Council. Accordingly, the City satisfies the first prong of the anti-SLAPP statute, as the City's installation of the Monument is clearly an exercise of the City's right of free speech respecting an issue of public interest and made in connection with a public proceeding, providing independent bases for the application of the statute.

2. Plaintiffs' claims targeting the City's expressive conduct in approving and installing the Monument are barred as cities have free speech rights protected under the United States and California constitutions.

3. Plaintiffs' mistaken contention that the City's conduct constitutes unconstitutional interference with the foreign affairs power fails as a matter of law. As an initial matter, Plaintiffs' claim is barred

by the doctrines of res judicata and collateral estoppel. In addition, there can be no foreign affairs "preemption" of purely expressive conduct, such as that at issue here, that does not regulate behavior, create duties, or create or limit rights. Even if purely expressive conduct could be "preempted" by the United States Constitution, such conduct would be preempted only to the extent that it has "more than an incidental or indirect impact" on foreign affairs and conflicts with federal policy. Here, there is no cognizable impact on foreign affairs, and there is no such conflict as federal policy on this issue is consistent with the Monument. Moreover, the foreign affairs provisions of the Constitution and the Supremacy Clause are not sources of individual rights cognizable under 42 U.S.C. § 1983 or otherwise.

4. Plaintiffs' mistaken contentions that the City violated the Equal Protection and Privilege and Immunities clauses of the California. Constitution fail as a matter of law, because Plaintiffs have failed to demonstrate any classification, let alone a discriminatory one.

5. Plaintiffs' contention that the City violated its charter by not complying with the Robert's Rules of Order also fails as a matter of law, as the failure to observe these rules is not jurisdictional and does not invalidate the action. Further, the City's approval of the Monument was fully consistent with Robert's Rules of Order.

The City's Motion is based upon this Notice of Motion and Motion; the attached Memorandum of Points and Authorities; the concurrently-filed Request for Judicial Notice; the Declaration of Christopher S.

Munsey; the Declaration of Karen Cruz; any and all pleadings and papers on file in this case; and any other arguments and other evidence as may be presented at the hearing on this matter. Furthermore, the City reserves its right to seek costs and attorneys' fees at a later date in the event that it prevails on its Motion.

GLENDALE CITY
ATTORNEY'S OFFICE
Michael J. Garcia
Ann M. Maurer
Andrew Rawcliffe

SIDLEY AUSTIN LLP
Bradley H. Ellis
Frank J. Broccolo
Christopher S. Munsey
Laura L. Richardson

By: /s/ Christopher S. Munsey
Attorneys for Defendant
City of Glendale

Dated: January 14, 2015

Memorandum of Points and Authorities

INTRODUCTION

Because they disagree with the message conveyed by a monument (the "Monument") dedicated to thousands of women coerced into sexual slavery during World War II, called the "Comfort Women," Plaintiffs filed—for the second time—a lawsuit for the sole purpose of forcing the City of Glendale (the "City") to permanently remove it.

Plaintiffs contend that a plaque included in the Monument expresses an allegedly "unfairly one-sided" account of this historical event, and that honoring the victims of these war crimes is "highly offensive" (Second Am. Compl. ("SAC"), ¶¶ 11, 22.) Having tried and failed to restrict the City's exercise of its First Amendment rights in federal court, Plaintiffs again seek to permanently remove the Monument by wrongly asserting that the City's approval and installation of the statue violates the foreign affairs provisions of the United States Constitution, Robert's Rules of Order, and the Equal Protection and Privilege and Immunities clauses of the California Constitution. (*Id.*, ¶¶ 25-41.) As explained below, this action is a classic example of a strategic lawsuit against public participation (a "SLAPP" suit), presenting a baseless challenge to the City's purely expressive conduct and actions taken in furtherance of that conduct.

The text of the plaque, which honors the memory of the Comfort Women (including those from Japan), demonstrates that Plaintiffs' claims are flawed. It reads in full:

I was a sex slave of Japanese military:

- Torn hair symbolizes the girl being snatched from her home by the Imperial Japanese Army.
- Tight fists represent the girl's firm resolve for a deliverance of justice.
- Bare and unsettled feet represent having been abandoned by the cold and unsympathetic world.
- Bird on the girl's shoulder symbolizes a bond between us and the deceased victims.
- Empty chair symbolizes survivors who are dying of old age without having yet witnessed justice.
- Shadow of the girl is that of an old grandma, symbolizing passage of time spent in silence.
- Butterfly in shadow represents hope that victims may resurrect one day to receive their apology.

Peace Monument

In memory of more than 200,000 Asian and Dutch women who were removed from their homes in Korea, China, Taiwan, Japan, the Philippines, Thailand, Vietnam, Malaysia, East Timor and Indonesia, to be coerced into sexual slavery by the Imperial Armed Forces of Japan between 1932 and 1945. And in celebration of proclamation of "Comfort Women Day" by the City of Glendale on July 30, 2012, and 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. It is our sincere hope that these unconscionable violations of human rights never recur.
>
> July 30, 2013

(SAC, ¶ 2; Declaration of Christopher S. Munsey ("Munsey Decl."), Ex. 21 (picture of Monument).)

Plaintiffs' claims cannot bear even slight scrutiny. First, the City's approval and installation of the Monument clearly constitute acts in furtherance of its petition and free speech rights, and, thus, is protected by California Code of Civil Procedure § 425.16 (the "Anti-SLAPP Statute"). Indeed, municipalities enjoy such rights under the California and federal constitutions, and are entitled to the same protections of the Anti-SLAPP Statute as individuals.

Here, the City's expressive conduct in installing the Monument satisfies all four grounds for invoking the Anti-SLAPP Statute under 425.16(e), each of which independently warrant its application, as (1) the city council approved the installation during an "official proceeding authorized by law," a meeting of the city council; (2) the installation of the Monument was made in connection with an "official proceeding authorized by law"; (3) the city council approved the Monument in a "public forum in connection with an issue of public interest" and placed the monument in a public forum; and (4) the approval and installation of the Monument constitute expressive government conduct in furtherance of the City's "constitutional

right of free speech in connection with a public issue or an issue of public interest."

Plaintiffs also cannot establish a probability that they will prevail on the merits. First, the First Amendment protects the City's installation of the Monument, defeating all of Plaintiffs' claims. Second, as the federal court found, Plaintiffs cannot state a viable claim for interference with foreign affairs power. As an initial matter, Plaintiffs' claim is barred by the doctrines of res judicata and collateral estoppel. In addition, there is no valid claim that purely expressive, non-regulatory action is preempted by federal law. In any event, Plaintiffs must, but cannot, show a cognizable effect on foreign affairs, and a conflict between the Monument's message and federal policy. Moreover, neither 42 U.S.C. § 1983, the Supremacy Clause, nor the foreign affairs power constitute a source of individual federal rights. Third, Plaintiffs fail to demonstrate that the Monument creates any classification, let alone a discriminatory one, which is a predicate for a claim under either the Equal Protection or Privileges and Immunities clauses of the California Constitution. Fourth, an alleged failure to comply with Robert's Rules of Order does not provide a basis to state a claim as a matter of law, and, in any event, the City's actions complied with those rules. Thus, the Court should dismiss this lawsuit under Section 425.16.

STATEMENT OF FACTS

I. The Crimes Committed Against the Comfort Women Are a Matter of Public Interest

The Monument was installed to educate the public about the horrendous war crimes the Japanese Imperial Army committed against the Comfort Women, which have received widespread international attention. From 1932 to 1945, "as many as 200,000 women" were "forced to provide sexual services to Japanese troops." (*See* Ex. 2 to Munsey Decl. at 2-3 (Japan, Country Reports on Human Rights Practices, Feb. 25, 2004).) They faced "gang rape, forced abortions, humiliation, and sexual violence resulting in mutilation, death, or eventual suicide in one of the largest cases of human trafficking in the 20th century." (Ex. 3 to Munsey Decl. (H. Res. 121, 110th Cong. (2007).) These women are referred to as "Comfort Women." (*See*, *e.g.*, *id.*)

A. The Japanese Government Has Issued and Reiterated a Public Apology Regarding the Comfort Women

On August 4, 1993, the Japanese Government reported the results of a study on the Comfort Women, documenting the Japanese Imperial Army's role in operating "comfort stations," the deprivation of freedom and "misery" the women suffered, and the "recruitment" of women "against their own will." (Ex. 4 to Munsey Decl. at 1-2 (Study "On the Issue of 'Comfort Women").) Then-Chief Cabinet Secretary Yohei Kono issued a statement in connection with the release of the study results, which stated that, "[u]ndeniably, this was an act, with the involvement

of the military authorities of the day, that severely injured the honor and dignity of many women. The Government of Japan would like to take this opportunity once again to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women." (Ex. 5 to Munsey Decl. at 1 (Statement by Chief Cabinet Secretary Yohei Kono (The "Kono Statement"), Aug. 4, 1993).)

The Government of Japan has periodically reiterated its policy regarding the Comfort Women, noting that the Kono Statement acknowledged that the issue was "with the involvement of the military authorities of the day, a grave affront to the honor dignity of a large number of women," and that "Japan has . . . expressed its sincere apologies and remorse to the former 'comfort women' on many occasions." (Exs. 6 & 7 to Munsey Decl. (Recent Policy of the Gov't of Japan, Nov., 2001 Recent Policy of the Gov't of Japan, Apr., 2007).) On March 14, 2014, Prime Minister Shinzo Abe stated that his government would not revise the Kono Statement and adheres to the apologies made by past governments. (Ex. 8 to Munsey Decl. (Remarks by Japanese Prime Minister. Abe).)

B. The U.S. Government Has Frequently Addressed the Comfort Women

On June 30, 2007, the United States House of Representatives passed House Resolution 121, concluding that the Government of Japan "should formally acknowledge, apologize, and accept historical responsibility in a clear and unequivocal manner

for its Imperial Armed Force's coercion of young women into sexual slavery."[1] (Ex. 3 to Munsey Decl. (H. Res. 121).) The Resolution recognized that "Japan, during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II, officially commissioned the acquisition of young women for the sole purpose of sexual servitude to its Imperial Armed Forces, who became known to the world as ianfu or 'comfort women.'" (*Id.*)

U.S. officials have made similar statements. On April 25, 2014, President. Obama stated publicly that "[A]ny of us who look back on the history of what happened to the comfort women . . . have to recognize that this was a terrible egregious 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."[2] (Ex. 12 to Munsey Decl. at 6 (Press Conference, Apr. 25, 2014).) On August 5, 2014, State Department spokesperson Jen Psaki stated that "[a]s we have stated many times, it is deplorable and

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[1] House Resolution 121 received widespread attention in the media as well. (*See* Ex. 9 to Munsey Decl. (document listing articles regarding the Comfort Women).)

[2] More recently, on June 30, 2014, Secretary of State John Kerry expressed concerns regarding Japan's claims over comfort women, stating that "We think it's very, very important not to have a revisionism of history . . . . We've encouraged the Japanese to deal with this issue with Korea with respect to the comfort women, and we should continue to encourage them to do so." (Ex. 13 to Munsey Decl. at 3 (Interview of Secretary of State John Kerry, Jun. 30, 2014).)

clearly a grave human rights violation of enormous proportions that the Japanese military was involved in the trafficking of women for sexual purposes in the 1930s and 1940s," and encouraged "Japan to continue to address this issue in a manner that promotes healing and facilitates better relations with neighboring states."[3] (Ex. 14 to Munsey Decl. at 8.)

C. Human Rights Violations, World War II, and the Comfort Women Are Included in California's Public Education Curriculum

The California State Board of Education, pursuant to state law, published the History-Social Science Framework and the History-Social Science Content Standards for Public Schools. These documents identify topics that students in California public schools are required to study "at each grade level." (Ex. 15 to Munsey Decl.) In grade ten, students learn about "genocide, including the Ottoman government's actions against Armenian citizens." (*Id.* § 10.5.) With respect to World War II, students are expected to "[c]ompare the German, Italian, and Japanese drives for empire in the 1930s, including the 1937 Rape of Nanking, [and] other atrocities in China" as well as to learn about "the Holocaust that resulted in the murder of six million Jewish civilians." (*Id.* § 10.8). California has also published a Model Curriculum for Human Rights and Genocide, which addresses these issues, and includes in a list of

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[3] On May 16, 2013, Ms. Psaki stated "[a]s the United States has stated previously, what happened in that era to these women who were trafficked for sexual purposes is deplorable and clearly a grave human rights violation of enormous proportions." (Ex. 10 to Munsey Decl. at 2-3.)

suggested resources a book entitled "*Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War*." (*See* Ex. 16 to Munsey Decl. at 2.)

II. The City Approved the Monument and Voted to Defend it Against Plaintiffs' Lawsuit

The City is a political subdivision of the State of California operating under a charter authorized by California. (SAC, ¶ 17; *see also* Ex. 17 to Munsey Decl. (City of Glendale Charter (the "Charter")).) The City's governing authority consists of a five-member city council (the "Council"). (SAC, ¶ 17.) The Charter provides the Council with the power to accept gifts on behalf of the City. (Charter, Art. III, § 2, ¶ 18.) On July 9, 2013, the Council voted to accept the Monument and install it in Central Park. (SAC, ¶¶ 2, 35; *see also* Declaration of Karen Cruz ("Cruz Decl.") ¶ 4, Ex. A at 1.)[4] The Council was "specifically advised that the inscription on the plaque would be different than the inscription ultimately used" and that the plaque would have language "commemorating and in honor of the comfort women." (*Id.*, ¶ 34.) On March 18, 2014, the Council unanimously voted to defend the Monument against the lawsuit. (*See* Cruz Decl. ¶ 5, Ex. B at 6.)

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[4] In voting to accept the Monument, Councilman Quintero moved for the City to approve the installation of the Monument, it was seconded by Councilman Sinanyan, and the Motion passed with four of five council members voting "aye." (Cruz Decl. ¶ 4, Ex. A at 5.)

III. Procedural History

On February 20, 2014, Plaintiffs filed a complaint in the United States District Court for the Central District of California alleging that the approval and installation of the Monument violated the U.S. Constitution's foreign affairs provisions and the Supremacy Clause, and the Glendale Municipal Code. (*See* Ex. 18 to Munsey Decl.) Thereafter, on April 11, 2014, the City filed a motion to dismiss and a special motion to strike pursuant to Section 425.16. In their response to the City's motion to dismiss, Plaintiffs conceded that they do not "den[y] in any respect" the crimes committed against the Comfort Women. (*See* Ex. 19 to Munsey Decl. at 1.)

On August 4, 2014, the district court dismissed with prejudice Plaintiffs' federal claim for lack of standing and failure to state a claim. (Ex. 20 to Munsey Decl. (Minute Order).) The court declined to exercise pendant jurisdiction over Plaintiffs' state-law claim and dismissed it.[5] (*Id.* at 7.)

ARGUMENT

In response to a "disturbing trend" of meritless actions designed to chill free speech and petitioning activity—like this one—the California Legislature enacted Code of Civil Procedure Section 425.16. The statute permits a defendant to file a "special motion to strike" a SLAPP suit at its inception, and applies regardless of whether the defendant is an individual or a municipality. *See Bradbury v. Super. Ct.*, 49 Cal. App. 4th 1108, 1115 (1996) (California courts have

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[5] The district court then denied the special motion to strike as moot. (*Id.* at 8.)

rejected the "argument that the First Amendment protects private citizens but not a governmental entity"); *see also Vargas v. City of Salinas*, 46 Cal. 4th 1, 17 (2009) (extending anti-SLAPP protections to the city for communications on a public issue or issue of public interest).

The statute provides a two-part test to facilitate the "eliminat[ion of] meritless or retaliatory litigation . . . [challenging a party's exercise of free speech or petition rights] at an early stage of the proceedings." *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 806 (2002). First, the Court must determine whether the plaintiff's lawsuit arises from acts by the defendant in furtherance of its rights of petition or free speech, as defined in section 425.16(e) of the statute. *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 184 Cal. App. 4th 1539, 1547 (2010). Where, as in this case, that threshold condition is satisfied, "[t]he burden then shifts to the plaintiff to establish a probability of prevailing on the claim." *Id.* If the plaintiffs cannot make the required showing, the Court must dismiss their complaint. *Seelig*, 97 Cal. App. 4th at 809.

I. Plaintiffs' Lawsuit Challenges the City's Exercise of its Rights of Free Speech

Under the first prong of the Anti-SLAPP analysis, the Court must determine whether Plaintiffs' lawsuit arises from acts by the City in furtherance of its rights of petition or free speech, as defined in California Civil Procedure Code Section 425.16(e). *Haight Ashbury*, 184 Cal. App. 4th at 1548. Here, the City meets this requirement for multiple, independent reasons.

First, the City approved the placement of the Comfort Women Monument during a meeting of the City Council. Accordingly, the City's challenged activity occurred during an "official proceeding authorized by law." Cal. Civ. Proc. Code § 425.16 (e)(1).

Second, for the same reasons, the City's placement of the statue was made in connection with an "official proceeding authorized by law." Cal. Civ. Proc. Code § 425.16(e)(2). Moreover, the Monument describes a resolution passed by the United States House of Representatives concerning the Comfort Women and, thus, relates to proceedings before Congress as well.

Third, placement of the Monument in a public park constitutes an exercise of free speech under the state and federal Constitutions and addresses an issue of public interest. Indeed, there can be little doubt that the installation of a statue constitutes expressive conduct, which satisfies the anti-SLAPP statute, regardless as to whether that conduct was performed by a municipality. The crimes against the Comfort Women are plainly an issue of "public interest." Courts in California have defined "public interest" as "any issue in which the public is interested." *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008) (emphasis added). Thus, "the issue need not be 'significant' to be protected by the anti-SLAPP statute-it is enough that it is one in which the public takes an interest." *Id.* (the anti-SLAPP "'shall be construed broadly' to safeguard 'the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances'").

As explained above, there has been extensive attention paid to this important historical issue by the government, including the President and House of Representatives. The Comfort Women have also received extensive media attention. Due to the importance of these historical events, California schools have incorporated a discussion of the crimes against the Comfort Women into their school curriculum. Indeed, the public has an interest in understanding crimes concerning human trafficking and the exploitation of women, separate and apart from well-known historical incidents. *See*, *e.g.*, *Sipple v. Found. for Nat'l Progress*, 71 Cal. App. 4th 226, 238-40 (1999) (violence against women is an issue of public interest). Consequently, the City's conduct was performed in connection with an issue of public interest and Section 425.16(e)(4) is satisfied.

Finally, the City approved the Monument in a meeting open to the public and placed the Monument in a public park. Accordingly, the City's conduct was "made in a place open to the public," and Section (e)(3) is satisfied as well.

II. Plaintiffs Will Be Unable to Establish a Probability of Prevailing on Their Claims

Because the City meets its burden of establishing that Section 425.16 applies, the burden of proof shifts to Plaintiffs, who must demonstrate with admissible evidence a "probability that [they] will prevail" to avoid the dismissal of their lawsuit. Cal. Code Civ. Proc. § 425.16(b)(1); *see also Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1236-39 (2003). Plaintiffs

cannot meet their burden, because their claims fail both legally and factually.

A. Plaintiffs' Claims Are Barred by First Amendment

"[T]he placement of a permanent monument in a public park is best viewed as a form of government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009). Such speech warrants protection under the First Amendment. The First Amendment protects not only an individual's right to self-expression but the "open marketplace of ideas." *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 354 (2010) (internal quotation marks omitted); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (the First Amendment protects "public access to discussion, debate, and the dissemination of information and ideas"). The central concern, then, is not the identity of the speaker, but the "rights of listeners to the widest possible dissemination of information from diverse and antagonistic sources." *Nadel v. Regents of Univ. of California*, 28 Cal. App. 4th 1251, 1262 (1994) (internal quotation marks omitted). Accordingly, the First Amendment protects contributions to the "open marketplace of ideas" regardless of the identity of the speaker. *See Bellotti*, 435 U.S. at 777 ("The inherent worth of . . . speech in terms of its capacity for informing the public does not depend on the identity of its source . . . ."); *cf. Citizens United*, 558 U.S. at 340 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). This includes government speakers, who have a "legitimate role to play in the interchange of ideas[;] . . . in informing, in educating, and in

persuading." *Nadel*, 28 Cal. App. 4th at 1262; *Bradbury*, 49 Cal. App. 4th at 1118 ("Government has a legitimate interest in informing and educating the public. It must be able to communicate."). For this reason, California courts have extended federal First Amendment protections to municipalities. *See*, *e.g.*, *Nizam-Aldine v. City of Oakland*, 47 Cal. App. 4th 364, 372-79 (1996) (finding First Amendment protected city). Thus, Plaintiffs' claims challenging the City's installation of the Monument are barred.

B. Plaintiffs' Foreign Affairs Claim Is Subject to Dismissal

1. Plaintiffs' Foreign Affairs Claim is Barred by the Doctrines of Res Judicata and Collateral Estoppel

In California, faith and credit must be given to a final order or judgment of a federal court." *Levy v. Cohen*, 19 Cal. 3d 165, 172 (1977). As a result, "[s]uch an order or judgment has the same effect in the courts of this state as it would have in a federal court," and res judicata "prevents the readjudication of all matters (including jurisdiction) which were, or might have been, litigated in a prior proceeding between the same parties." *Id.* at 173. In determining the preclusive effects of federal judgments, California courts apply the federal rule, which is that "a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition."[6]

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6 The rule for California state court judgments, which does not apply here, is that there is no preclusive effect until all appeals are exhausted. *See*, *e.g.*, *Kay v. City of Rancho Palos Verdes*,

Estate of Hilton, 199 Cal.App.3d 1145, 1168 (1988); *Lumpkin v. Jordan*, 49 Cal.App. 4th 1223, 1230 (1996) (federal judgment final while appeal pending before the Ninth Circuit). The requirements of res judicata—(1) the issues are identical to those decided in the prior adjudication; (2) a final judgment on the merits; and (3) a party, or its privy, to the prior adjudication—are all met here. *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001).

Plaintiffs previously brought the foreign affairs claim in federal court, where it was dismissed "with prejudice." (Ex. 20 to Munsey Decl. at 6 (Minute Order).) Undeterred, Plaintiffs are now engaged in blatant forum shopping, seeking a more favorable result on the foreign affairs claim in this Court. However, the federal court's dismissal order is final for the purposes of res judicata unless and until it is reversed on appeal, and, as a result, at least as to Plaintiffs Gingery, Mera, and GAHT-US, the foreign affairs claim is barred. *Estate of Hilton*, 199 Cal. App. 3d at 1168. Plaintiffs could not, while the appeal is pending, simply re-file the foreign affairs claim in another federal court, and Full Faith and Credit demands that they not be allowed to do so here.

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504 F.3d 803, 808 (9th Cir. 2007) (noting difference between California and federal rules).

2. Defendant's Conduct Is Not Preempted by the U.S. Government's Foreign Affairs Power for Multiple Independent Reasons

Even if it were not preclusive, Plaintiffs cannot establish that the federal court's dismissal order and its interpretation of federal law were in error. The federal court concluded that "[n]either the Supremacy Clause nor the Constitution's delegation of foreign affairs powers to the federal government prevent a municipality from acting as [the City] has done," and that the Monument "does not pose the type of interference with the federal government's foreign affairs powers that states a plausible claim for relief." (Ex. 20 to Munsey Decl. at 6-7.) Moreover, the installation of the Monument "is entirely consistent with the federal government's foreign policy," and Plaintiffs cannot demonstrate the "required 'clear conflict.'" (*Id.*) The court also explained that "[a]ny contrary conclusion would invite unwarranted judicial involvement in the myriad symbolic displays and public policy issues that have some tangential relationship to foreign affairs." (*Id.* at 7.) These holdings are correct, and there is no reason to deviate from them here. *See Barrett v. Rosenthal*, 40 Cal. 4th 33, 58 (2006) (the decisions of lower federal courts on federal questions are "persuasive and entitled to great weight").

a. Purely Expressive Conduct Cannot be "Preempted" by the U.S. Government's Foreign Affairs Power

Where, as here, the challenged action is purely expressive, and does not create <u>any</u> enforceable rights, regulate <u>any</u> behavior, or impose <u>any</u>

liabilities, there is simply no law to be preempted. Notably, in *Movsesian v. Victoria Versicherung AG*, the court specifically observed that the law at issue was not "merely expressive," but instead was a "concrete policy of redress" that "subject[ed] foreign insurance companies to suit in California by overriding forum-selection provisions and greatly extending the statute of limitations for a narrowly defined class of claims."[7] 670 F.3d 1067, 1077 (9th Cir. 2012). The court did not "offer any opinion about California's ability to express support for Armenians" through "merely expressive" conduct. *Id.* at 1077 & n.5.

There is good reason why purely expressive conduct is not "preempted" by the foreign affairs power. As the Ninth Circuit has recognized, "[c]ities,

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[7] Every case finding foreign affairs preemption has dealt with regulatory and coercive action. *See*, *e.g.*, *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 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); *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003) (requiring insurers doing business in California to make extensive disclosures of information to state for potential use in lawsuits regarding the Holocaust); *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).

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 . . . matters subject to preemption, such as foreign policy . . . ." *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)[8]; *Summum*, 555 U.S. at 470, 480 ("Governments have long used monuments to speak to the public," including regarding controversial foreign policy issues, as is the case with "war memorial[s]"). Notably, in response to a petition to remove the Monument, (*see* Ex. 18 to Munsey Decl. at 11 (Federal Complaint)), the White House stated that "local governments, not the federal government, have jurisdiction over issues such as . . . the placement of memorials in local parks." (Ex. 23 to Munsey Decl.) Plaintiff's theory, which would prevent local governments from communicating on issues of public concern, is "antithetical to fundamental principles of federalism and democracy." *Alameda Newspapers, Inc.*, 95 F.3d at 1415.

Indeed, Plaintiffs' theory would call into question an enormous amount of state and local action. It would jeopardize not just the Monument at issue here, but numerous statues, memorials, and museum

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[8] "As representatives of local communities . . . city councils have traditionally made declarations of policy on matters of concern to the community whether or not they had power to effectuate such declarations by binding legislation. Indeed, one of the purposes of local government is to represent its citizens before the Congress, the Legislature, and administrative agencies in matters over which the local government has no power. Even in matters of foreign policy it is not uncommon for local legislative bodies to make their positions known." *Id.* (emphasis added).

exhibits commemorating historical events. Moreover, states and localities regularly make proclamations and pronouncements honoring historical and contemporary events and stating their values, including on issues touching on foreign nations. (*See*, *e.g.*, Ex. 1 to Munsey Decl. (document listing memorials, proclaimations, and resolutions relating to foreign nations)). Such statements which, like the Monument here, do no more than commemorate historical events and proclaim the locality's values, would be impermissible under Plaintiffs' logic. In addition, public school curriculum regarding historical or even current events that take place in a foreign country would be subject to preemption. Important topics of public school instruction, including human rights violations and genocide, would be endangered.[9] Indeed, Plaintiffs have conceded that under their legal theory school curriculum could be so challenged. (*See* Ex. 19 to Munsey Decl. at 19 n.15 (Opp. to Motion to Dismiss).)

b. Plaintiffs Cannot Demonstrate That the Monument Has More Than an Incidental or Indirect Effect on Foreign Affairs

Even if purely expressive conduct could be "preempted," Plaintiffs also must, but cannot, show that the Monument has "more than some incidental or indirect effect" on foreign affairs. *See Movsesian*, 670 F.3d at 1076. Every case to have found a sufficient such effect addressed a law with actual

[9] Indeed, under Plaintiffs' theory, the Court's own daily history lesson, to the extent it involved any foreign nation or topic, would be subject to foreign affairs preemption.

regulatory impact. *See id.* (law at issue "subject[ed] foreign insurance to lawsuits in California"); *see also* Note 5, *supra*. Here, by contrast, the only "effect" Plaintiffs identify is the negative reaction to the Monument of various Japanese politicians. (SAC ¶ 9.) That is not sufficient. Moreover, holding that foreign reactions constitute an impermissible effect on foreign affairs for the purposes of preemption would create an unworkable and dangerous standard. If the displeasure of foreign politicians alone were sufficient, state and local officials would have no way of knowing, before they approved a purely expressive action regarding a historical event, whether or not it was constitutional. Moreover, such a rule would subject all non-regulatory state and local commemorations of historical events to the whims of shifting political opinion in other countries. A monument or museum addressing a particular historical event might be constitutional for years, only to suddenly "become" unconstitutional because new officials in a foreign country disagreed with its message. This too would "mark an unprecedented and extraordinary intrusion into the rights of state and local governments." *Alameda Newspapers, Inc.*, 95 F.3d at 1415.

c. The City's Conduct Does Not Conflict with Federal Policy

Moreover, the Supreme Court has explained that where, as here, a city or state acts within an area of "traditional competence . . . it might make good sense to require a conflict" with federal policy in order to find preemption. *See Am. Ins. Co. v. Garamendi*, 539 U.S. 396, 420 (2003). As the Ninth Circuit has held, cities have a "long tradition of

issuing pronouncements, proclamations, and statements of principle on a wide range of matters of public interest," including "foreign policy and immigration." *Alameda Newspapers*, 95 F.3d at 1414; *see also Farley*, 67 Cal. 2d at 328; *Summum*, 555 U.S. at 470.[10] Thus, as the federal court noted, Plaintiffs must, but cannot, show a "clear conflict" between the Monument and federal policy. (Ex. 20 to Munsey Decl. at 6.)

As the federal court found, and State Department reports, statements by executive officials (including the President), and Congressional action demonstrate, the Monument is "entirely consistent with the federal government's foreign policy." (*Id.* at 7.)

3. Plaintiffs Cannot Bring an Action Under Section 1983

In addition to the foregoing reasons, which independently warrant dismissal, Plaintiffs claim to sue under 42 U.S.C. § 1983, but cannot identify any federal law providing them individual rights to be vindicated under Section 1983. "[O]ne cannot go into court and claim a violation of § 1983 for § 1983 by itself does not protect anyone against anything[, it] merely provides a mechanism for enforcing individuals rights 'secured' elsewhere." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (internal quotations omitted).

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[10] In *Summum*, the Supreme Court recognized that localities regularly accept monuments and memorials to controversial foreign policy issues, such as wars. 555 U.S. at 480 (rejecting argument that "[e]very jurisdiction that has accepted a donated war memorial [must] provide equal treatment for a donated monument questioning the cause for which the veterans fought").

To assert a valid cause of action under Section 1983, Plaintiffs must, but cannot, identify a Constitutional provision or federal law that is a source of individual rights.

First, the Supremacy Clause is not a source of individual rights cognizable under Section 1983. *See*, *e.g.*, *Henry v. Homecomings Fin.*, Case No. 09-15152, 376 Fed. App'x 777, 2010 WL 1552820 (9th Cir. 2010) (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) ("the Supremacy Clause . . . does not create rights enforceable under § 1983")).

Second, the sections of the Constitution dealing with the United States' foreign affairs powers are also not a source of individual rights under Section 1983. *See Berg v. Obama*, 574 F.Supp.2d 509, 522 (E.D. Pa. 2008), citing *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803, 811 (9th Cir. 2005) (Graber, J., concurring) ("the foreign affairs power, like the Supremacy Clause, creates no individual rights enforceable under 42 U.S.C. § 1983"). Accordingly, no Section 1983 claim may be stated for their purported violation either. Finally, Plaintiffs cannot identify any federal statute providing them individual rights that the non-regulatory Monument at issue here violated. Plaintiffs cannot state a valid claim under Section 1983.

C. Plaintiffs' Equal Protection Claim Is Subject to Dismissal

1. The Monument Does Not Create Any Classification

The Monument does not create any classification whatsoever, and, accordingly, Plaintiffs' claim must fail. To sustain a claim for a violation of the Equal Protection Clause, a plaintiff "must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." *People v. Gonzales*, 87 Cal. App. 4th 1, 12 (2001). Because "[t]he equal protection clause contained in article I, section 7, of the California Constitution is coextensive with its federal counterpart found in the Fourteenth Amendment to the United States Constitution," *In re Conservatorship & Estate of Eddie*, 173 Cal. App. 4th 883, 891 (2009), "Federal and state equal protection analysis is substantially the same." *People v. Shields*, 199 Cal. App. 4th 323, 333 (2011). Government actors "may create classifications facially, when such categorization appears in the language of legislation or regulation . . . or *de facto*, through the enforcement of a facially neutral law in a manner so as to disparately impact a discernible group" with "[d]iscriminatory purpose," *Johnson v. Rodriguez*, 110 F.3d 299, 306-07 (5th Cir. 1997) (citations omitted). Here, however, Plaintiffs cannot establish either of these predicates, because the Monument merely commemorates the Comfort Women and describes historical events. Moreover, despite Plaintiffs' assertions to the contrary, the facts described by the Monument are recognized by the United States, California, and the Japanese Govern-

ments, and do not discriminate against anyone in any event.

As an initial matter, the acceptance and installation of the Monument does not constitute a facial classification. Plaintiffs' suggestion that the Monument "single[s] out [] Japanese-American citizens," (SAC, ¶ 5), is patently false. No such categoryization appears on the Monument and/or its accompanying plaque. The Monument does not address Japanese-Americans, or persons of Japanese origin, at all. To the extent that the Monument says anything at all about people of Japanese origin, it honors them by recognizing that Japanese women were also removed from their homes and forced into sexual servitude. Indeed, the Monument only refers to the Imperial Japanese Army; the Government of Japan; and the Comfort Women who were removed from their homes in Japan. Rather than creating a classification, the Monument merely memorializes history, exactly like numerous other monuments throughout California that address Nazi war crimes and the disgraceful internment camps created by the United States government during World War II.

In addition, Plaintiffs have also failed to demonstrate that the acceptance and placement of the Monument has had a disparate impact on a discernible group. To demonstrate a disparate impact on a discernible group, Plaintiffs "must present specific factual evidence to demonstrate that [the government conduct] imposes on [Japanese-Americans] as a group a measurable burden or denies them an identifiable benefit." *Coleman v. Miller*, 117 F.3d 527, 530 (11th Cir. 1997). The Monument, as a purely expressive display, neither imposes on Japanese-

Americans a measureable burden, nor denies them an identifiable benefit.

Coleman is instructive. There, the appellant claimed that Georgia's placement of the Confederate flag on its public buildings violated the Equal Protection Clause because it "inspire[d] in him fear of violence, cause[d] him to devalue himself as a person, and sen[t] an exclusionary message to Georgia's African-American citizens." *Id.* at 529. While the Eleventh Circuit noted that Georgia's decision to display the flag was regrettable as the flag "divides rather than unifies the citizens," the court held that such "anecdotal evidence of intangible harm" was insufficient to sustain the equal protection claim. *Id.* at 530-31 (emphasis added). Plaintiffs rely on the same type of insufficient anecdotal allegations of intangible harm. Plaintiff's allegations that "they have been denied full enjoyment of Glendale's Central Park's benefits" as the City has turned "visiting the park into a highly offensive locale" and made them feel "unwelcome at the Adult Recreation Center," (SAC, ¶ 22), are materially indistinguishable from Coleman's claims that the Confederate flag devalues him and presents an exclusionary message to African-Americans. *See Coleman*, 117 F.3d 529. Because all of Glendale's residents are equally exposed to the statue and it does not create a measurable burden or deny an identifiable benefit, Plaintiffs fail to articulate a classification to support their equal protection claim. *See id.* at 530; *see also N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1562 (11th Cir. 1990) (holding that the flying of confederate flag did not violate Equal Protection because "there is no

unequal application of the state policy; all citizens are exposed to the flag").

Even if Plaintiffs could allege a measurable and identifiable disparate impact, they cannot demonstrate purposeful discrimination motivating the installation of the Monument. *See Johnson*, 110 F.3d at 306 ("[D]isparate impact alone cannot suffice to state an Equal Protection violation; otherwise any law could be challenged on Equal Protection grounds by whomever it has negatively impacted . . . . [An Equal Protection plaintiff] must prove 'the existence of purposeful discrimination' motivating the state action which caused the complained-of injury" (emphasis in original)). Here, as Plaintiffs previously acknowledged, the City's purpose in installing the Monument was "commemorating and in honor of the Comfort Women," (Ex. 18 to Munsey Decl. at 30 (Federal Complaint); First Am. Compl., ¶ 44). *See Hunt*, 861 F.2d at 1562 ("Because there are two accounts of why Alabama flies the flag . . . it is not certain that the flag was hoisted for racially discriminatory reasons"). To the extent Plaintiffs allege that the City adopted any alleged discriminatory purpose of the Monument's donors, that argument is foreclosed by *Summum*. 555 U.S. at 476 ("By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor").

Accordingly, Plaintiffs cannot demonstrate that the City's conduct violates the Equal Protection Clause. *See Johnson*, 110 F.3d at 306 ("[I]f the challenged government action does not appear to

classify or distinguish between two or more relevant persons or groups, then the action—even if irrational—does not deny them equal protection of the laws.") (citation omitted).

2. The City Has a Right to Educate its Citizens Concerning a Matter of Public Interest

Plaintiffs' claim boils down to the government's disparate treatment of their preferred message regarding Comfort Women. In support, Plaintiffs allege that the City's other sister cities, including Higashiosaka, Japan, do not have monuments in this area of the park, which is dedicated to the City's sister cities. (SAC, ¶ 39.) However, Plaintiffs do not allege that Higashiosaka, or any other city, has sought to place such a monument in Central Park, that approval was denied for improper reasons, and/or how such a monument would address the Comfort Women issue. Similarly, they claim that the Monument "ignor[es] the wartime suffering and patriotism of Japanese-Americans," (*id.*), but do not allege that any monument concerning these issues has ever been proposed to, much less rejected by, the City Council.

More fundamentally, a government may "select the views that it wants to express." *Summum*, 555 U.S. at 460. Accordingly, multiple courts have held that government expressive displays may not be challenged under the Equal Protection Clause. *See, e.g.*, *Freedom From Religion Found., Inc. v. City of Warren, Mich.*, 707 F.3d 686, 698 (6th Cir. 2013) ("To the extent the Foundation means to claim that the City's government speech commemorating the holiday

disparately treats its preferred message, the answer is: welcome to the crowd. Not everyone, we suspect, is happy with the City's holiday display from one year to the next.")[11]

If Plaintiffs disagree with the view of historical events expressed by the Monument, their remedy is clear: more speech, not less, and resort to the ballot box. *See*, *e.g.*, *Freedom from Religion Found.*, 707 F.3d at 698 (stating that plaintiff was free, if it was offended by the city's speech, to "try to elect new officials to run the City—the customary answer to permissible government speech and the customary answer to policies with which citizens disagree"); *cf. Vargas v. City of Salinas*, 200 Cal.App. 4th 1331, 1347 (2011) ("In our system of government, the principal method for controlling the content of government speech is through the ballot box. 'When

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[11] *See also Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 975 (9th Cir. 2011) ("Because Johnson had no individual right to speak for the government, he could not have suffered an equal protection violation" by the school permitting sectarian displays and denying his religious displays); *Wells v. City & County of Denver*, 257 F.3d 1132, 1153 (10th Cir. 2001) (city's holiday display did not violate Equal Protection Clause because plaintiffs had no "rights to dictate the content of that speech" and thus, were not treated differently from others similarly situated); *Ame. Civil Liberties Union of N.J. v. Schundler*, 931 F.Supp. 1180, 1186 (D. N.J. 1995) (City's display of crèche and menorah at entrance to city hall without any secular symbols of holiday season did not violate Equal Protection Clause because it did not treat plaintiffs differently) (aff d in part, rev'd in part, 104 F.3d 1435 (3d Cir. 1997)); *cf. Summum*, 555 U.S. at 479 ("If government entities must maintain viewpoini neutrality in their selection of donated monuments, they must either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments.")

the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.'").

D. Plaintiffs' Privileges and Immunities Claim Is Subject to Dismissal

Plaintiffs' claim that the City violated the Privileges and Immunities Clause of the California Constitution fails for the same reasons as their Equal Protection claim, namely that the City's purely expressive conduct does not create a classification. *See People v. Housman*, 163 Cal.App.3d Supp. 43, 52-53 (1984) ("The California . . . privileges and immunities clause[] call[s] for the same analysis as called for by the equal protection provisions . . . ."). Moreover, GAHT-US, as a corporation, cannot bring a claim under the privileges and immunities clause. *See City & Cnty. of S.F. v. Flying Dutchman Park, Inc.*, 122 Cal.App. 4th 74, 87 (2004) ("[C]orporations are not entitled to the protection of the privileges and immunities clause because they are not 'citizens.'")

E. Plaintiffs' Claim for a Municipal Code Violation Is Subject to Dismissal

Plaintiffs' claim that the City violated its Charter by not complying with Robert's. Rules of Order fails as a matter of law. Robert's Rules of Order is a parliamentary guide that cities adopt to assist their councils to transact their affairs in an orderly fashion. *City of Pasadena v. Paine*, 126 Cal. App.2d 93, 96 (1954). Accordingly, they are "procedural

and their strict observance is not mandatory . . . [and] a failure to observe one of them is not jurisdictional and does not invalidate action which is otherwise in conformity with charter requirements." *Id.*; s*ee also The California Municipal Law Handbook*, (Cont. Ed. Bar 2013 ed.) § 2.45 ("Robert's Rules of Order was not written to apply to public legislative bodies and it cannot be strictly followed.").

Furthermore, a council may abolish, suspend, and modify its own parliamentary rules, and therefore a measure passed in compliance with the charter will not be void simply because a parliamentary rule was violated. *City of Pasadena*, 126 Cal.App.2d at 96 (citation omitted) (internal quotation marks omitted). Therefore, even if the Council failed to comply with Robert's Rules of Order in this case, it would not create a basis for injunctive or declaratory relief.

Regardless, the Monument, of which the plaque is a part, was properly approved by the City. The Council voted to accept and install it in Central Park, (SAC, ¶ 35), in accordance with Robert's Rules of Order, which state: "[T]o introduce a new piece of business or propose a decision or action, a motion must be made by a group member. A second motion must then also be made. And after limited discussion, the group then votes on the motion. A majority vote is required for the motion to pass." (*Id.*, ¶ 33 (citations omitted).) These provisions were followed. Councilman Quintero moved to approve the installation of the Monument, it was seconded by Councilman Sinanyan, and the Motion passed with

four of five council members voting "aye." (Cruz Decl. ¶ 4, Ex. A.)

Moreover, the Charter provides the Council with the power to accept gifts on behalf of the City, but does not require Council to review all the details of the gift prior to its acceptance. (Charter, Art. III, § 2, ¶ 18, Art. III § 18, Art. VI § 4.) The Council accepted the Monument knowing that it would include a plaque with language "commemorating and in honor of the comfort women" that was yet to be determined. (Ex. 18 to Munsey Decl. at 10-11 (Federal Complaint); SAC ¶ 34; *see also* First Am. Compl., ¶¶ 44, 74.) The Council never showed any intent to reserve the specific language on the plaque for its later review and approval. Instead, the Council voted to accept the Monument even though it was advised that the language had not been finalized. (SAC ¶ 34.) There is nothing in either the Charter or Municipal Code that prevents the Council from accepting a gift or approving a monument in this manner.

Nor do Plaintiffs identify any ordinance that would require the Council to approve every detail, which restrictions must be "clear and explicit." *See Hiller v. City of Los Angeles*, 197 Cal.App.2d 685, 689 (1961) ("The disposition and use of park lands is a municipal affair[;]" "a charter city has plenary powers with respect to municipal affairs;" any " limitations on municipal power must be express, they must be clear and explicit, and no restriction on the exercise of municipal power may be implied.") (citations omitted).

In addition, to the extent that the Council wanted to and/or was required to re-approve the Monument after the specific language of the plaque

was unveiled, they did so when they voted to defend the Monument against Plaintiffs' lawsuit. (*See* Cruz Decl., 115, Ex. B at 6).

CONCLUSION

For the foregoing reasons, the Court should strike the Second Amended Complaint in its entirety.

GLENDALE CITY
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By: /s/ Christopher S. Munsey
Attorneys for Defendant
City of Glendale

Dated: January 14, 2015

SUPPLEMENTAL LETTER BRIEF OF APPELLANTS (AUGUST 23, 2016)

Court of Appeal for the State of California
Second Appellate District, Division Five
300 S. Spring Street
Los Angeles, CA 90013

Re: *Michiko Gingery, et al. v. City of Glendale*
Court of Appeal Case No. B264209

To the Presiding Justice and Associate Justices of Division Five:

Appellants submit this letter brief pursuant to the Court of Appeal's notice of August 9, 2016 permitting the parties to file simultaneous letter briefs on or before August 23, 2016 regarding the United States Court of Appeals for the Ninth Circuit's panel opinion in federal case number 14-56440, *Gingery v. City of Glendale* (decided Aug. 4, 2016).

Before discussing the Ninth Circuit's panel opinion, Appellants respectfully advise this Court that on August 18, 2016 the Ninth Circuit granted an unopposed motion for a 29-day extension of the time within which to file a petition for panel rehearing and/or rehearing en banc. The petition is to be filed on or before September 16, 2016. Appellants Koichi Mera and GAHT-US will timey file such a petition.

In light of the Ninth Circuit's order, Appellants respectfully request that this Court stay its consideration of the instant appeal until the Ninth Circuit has disposed of the petition for panel rehearing and/or rehearing en banc. Holding this case until that time would permit this Court to consider the full

Ninth Circuit's deliberations before deciding the issues addressed herein. Given the complexity of this case, a stay would also serve judicial economy and prevent this Court from relying on a panel opinion that may not represent Ninth Circuit law. This Court has the inherent power to control the proceedings before it to ensure the orderly administration of justice. *See* Code Civ. Proc., § 128, subds. (a)(3), (8). This includes the power to stay proceedings during the pendency of an appeal or to make any other order that will preserve its effectiveness or aid its jurisdiction. Code Civ. Proc., § 923; *see also Neman v. Commercial Capital Bank* (2009) 173 Cal. App. 4th 645, 653.

Whether or not this Court stays its proceedings, Appellants submit that the Ninth Circuit's panel opinion does not control in any event.

In *Gingery*, a three-judge panel of the Ninth Circuit, after finding federal, Article III standing (Slip Op. at 7–10), held that Appellants Koichi Mera and GAHT-US Corporation[1] failed to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) on their foreign affairs claim. Slip Op. at 11. The Ninth Circuit framed the issue as follows: "whether the Supremacy Clause preempts a local government's expression, through a public monument, of a particular viewpoint on a matter related to foreign affairs." Slip Op. at 13.

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[1] Appellant Michiko Gingery's claim was rendered moot on account of her death. Slip Op. at 7. Appellant Masatoshi Naoki was not a party to the federal proceeding.

Applying the federal plausibility standard[2] and the Ninth Circuit's test for field preemption enunciated in *Movsesian v. Victoria Versicherung AG* (9th Cir. 2012) 670 F.3d 1067 (en banc), the Ninth Circuit's panel held that Glendale's monument "is well within the traditional responsibilities of state and local governments," (Slip Op. at 13-14), and that Glendale's actions have not intruded on the federal government's foreign affairs powers (Slip Op. at 15-16).

The Ninth Circuit's panel decision is neither dispositive nor persuasive:

First, the Ninth Circuit's panel opinion is not dispositive because there is no res judicata. The defense of res judicata bars the relitigation of the same cause of action, between the same parties where a "final judgment" on the merits has been entered in the prior action. *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896. The plaintiffs in the two cases are not the same. Appellant Masatoshi Naoki was not a party to the federal lawsuit and has **no** legal relationship with the federal plaintiffs. Furthermore, the claims are not the same. The Ninth Circuit only considered the foreign affairs claim. Even if Appellants

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[2] That standard requires that the federal court accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the plaintiff. *United States ex rel. Lee v. Corinthian Colls.* (9th Cir. 2011) 655 F.3d 984, 991. A claim has facial plausibility when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable. *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678. Importantly, plausible does not mean probable; it requires only "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

Mera and GAHT-US are precluded on this claim,[3] Appellants' additional claims for violations of Equal Protection, Privileges and Immunities, and the Municipal Code in this action are not precluded. Thus, res judicata does not apply. Furthermore, collateral estoppel does not apply to this action for substantially the same reasons.[4]

Second, the Ninth Circuit's panel opinion is not dispositive because it is not controlling as a matter of federal law.[5] Only the Supreme Court can bind state courts as to the interpretation of federal law and the U.S. Constitution. *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320–21. As such, this Court is required and entitled to make an independently

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[3] Because Appellants Mera and GAHT-US relied on additional evidence in filing the state court complaint that was not available in the federal court proceeding in pleading their foreign affairs claim, there is also no res judicata as to either of them because under both federal and state law changed law and facts bar application of res judicata and collateral estoppel. *See, e.g., Hiser v. Franklin* (9th Cir. 1996) 94 F.3d 1287, 1292; *Starr v. City & Cty. of San Francisco* (1977) 72 Cal. App. 3d 164, 178–79; *Keidatz v. Albany* (1952) 39 Cal. 2d 826, 828.

[4] A collateral estoppel defense consists of the following elements: (1) the issue previously adjudicated must be identical to the issue in the subsequent action; (2) the issue must have been previously actually litigated; (3) the issue must have been necessarily decided previously; (4) the decision on the former proceeding must have been final and on the merits; (5) the party against whom preclusion is asserted must be the same as, or in privity with, the parties in the prior proceeding. *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943.

[5] As already noted, the Ninth Circuit's panel decision is subject to a petition for rehearing and/or rehearing en banc, and, as such, may not represent the Ninth Circuit's final decision on the foreign affairs claim.

formed and well-reasoned analysis and judgment on the applicable test for foreign affairs preemption. *Id.* An independent analysis would include consideration of the facts pled in the state court complaint and the arguments raised in Appellants' Opening and Reply Briefs filed in this Court.

Third, the Ninth Circuit's panel opinion is not persuasive because that panel was clear that it was only deciding the foreign affairs claim "[u]nder the circumstances of this case." Slip Op. at 13 (emphasis added). The facts and circumstances alleged in the instant complaint are materially different. The case before this Court is premised on allegations supporting the foreign affairs preemption claim, as well as additional claims for violations of Equal Protection and Privileges and Immunities under the California Constitution, which were not included in the federal complaint. This case also rests on an evidentiary record that far exceeds what was before the Ninth Circuit's panel. The Ninth Circuit's panel was reviewing a federal trial court order on a Rule 12(b)(6) motion to dismiss. As such, the factual record was confined to the four corners of the federal complaint.

In contrast, plaintiffs here submitted evidence that was not in the federal complaint: three extensive declarations, video evidence of the relevant city council meeting, press releases, news articles, and a letter from Glendale's then-mayor expressing his objection, criticism and regret that Glendale took a position on a contentious issue of foreign affairs. *See, e.g.,* Appellants' Appendix ("AA") 336–93, 400. Moreover, there have been significant international developments on the comfort women issue since the federal complaint was filed in February 2014. In partic-

ular, Japan's Chief Cabinet Secretary commented directly on Glendale's monument and this lawsuit in a February 25, 2015 press release, and U.S. Ambassador to Japan, Caroline Kennedy, made numerous statements encouraging Japan and South Korea to amicably resolve their differences without U.S. involvement in a *60 Minutes* CBS television broadcast on April 12, 2015. *See* Plaintiffs-Appellants' Opening Brief at 19–20; Plaintiffs-Appellants' Reply Brief at 44–45. Even more recently, Japan and South Korea entered into abinding agreement in December 2015 that "finally and irreversibly" resolved 70 years of debate between the two countries on the issue, about which U.S. Secretary of State John Kerry publicly stated, "we call upon the international community to support it." Plaintiffs-Appellants' Reply Brief at 47–48. none of these developments were considered by the Ninth Circuit, and each evidences the fact that Glendale has taken a contested position on a sensitive and diplomatic issue that has intruded on foreign affairs.

Fourth, the Ninth Circuit's panel decision disregarded the traditional rule that the facts must be viewed in the light most favorable to the plaintiffs. The Ninth Circuit's panel erroneously characterized the Monument as merely commemorative and disregarded Appellants' well-pleaded factual allegations that Glendale's Monument condemned Japan and "urg[ed] the Japanese Government to accept historical responsibility for [the comfort women] crimes." AA 061. Glendale has not merely commemorated some uncontested historical event. It has taken a charged political position on a contested matter of foreign affairs and urged a friendly and important

ally of the United States to accept responsibility for alleged violations of international human rights law. Even if the Ninth Circuit's panel is correct that a local government may memorialize and commemorate on foreign affairs matters, it may not urge and advocate a foreign nation to take a course on a contested matter of foreign affairs. By way of example, just as Glendale cannot by a monument and plaque urge Israel to accept that Jerusalem is the Capital of Palestine, so too can it not urge Japan to accept historical responsibility for contested acts allegedly committed during World War II.

Fifth, in addition to the above arguments, Appellants respectfully request that this Court solicit the views of the United States and Japan. A key part of the Ninth Circuit panel's analysis was that "the federal government has [not] expressed any view on the monument." Slip Op. at 16. Yet, the Ninth Circuit's panel never requested the views of the United States, which Appellants believe would advance this Court's resolution of the instant appeal. Appellants believe the views of the Government of Japan would also advance this Court's deliberations.

In conclusion, Appellants respectfully request that this Court stay its proceedings until the Ninth Circuit disposes of the petition for rehearing and/or rehearing en banc. If this Court does not stay its proceedings, for the foregoing reasons and those stated in Appellants' briefing, this Court should make an independently formed and well-reasoned determination on the facts of this case, hold the anti-SLAPP statute does not apply or Appellants meet the minimal merits standard on their foreign affairs and other claims, and remand for further proceedings.

Respectfully submitted,

Law Offices of Ronald S. Barak
Blecher Collins & Pepperman

By: /s/ Ronald S. Barak
Attorneys for Appellants

FIRST LETTER FROM BARRY A. FISHER (FEBRUARY 21, 2017)

Fleishman & Fisher
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Presiding and Associate Justices
Court of Appeal, Second Appellate District, Division 5
Ronald Reagan State Building
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2nd Floor, North Tower
Los Angeles, CA 90013

Re: *Gingery v. City of Glendale* (B264209 9/23/16)
California Supreme Court S 239962 (Publication)

California Supreme Court Clerk/Administrator Jorge E. Navarrete has directed me by Phone on February 21, 2017 to submit the enclosed to the Court of Appeal for transmission from it to the Supreme Court which has docketed the matter as S239962.

This Court previously denied my publication application and transferred the publication issue, including this court's ruling and my letter, to the Supreme Court. Thereafter I spoke to a Supreme Court clerk about filing a supplement to my request, was given the docket number and directed to send it directly to the Supreme Court with 8 copies. After its receipt, Clerk of the Court Navarrete spoke to me and said to follow a different procedure, to instead submit it to the Court of Appeal for its transmission from it to the Supreme Court. I then spoke to a Division 5 clerk

who said to address this explanation to the Justices who presided over the matter.

The submission is enclosed for your review and, hopefully, transmittal.

Sincerely yours,

Barry A. Fisher

SECOND LETTER FROM BARRY A. FISHER (FEBRUARY 21, 2017)

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Presiding and Associate Justices
Court of Appeal, Second Appellate District, Division 5
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Los Angeles, CA 90013

Re: *Gingery v. City of Glendale* (B264209 9/23/16)
California Supreme Court S 239962 (Publication)

Dear Justices:

Previously this Court rejected my publication request and transferred this matter to the Supreme Court where it is now docketed as S239962. This letter updates and supplements information in my letter previously submitted and is sent to the Court of Appeal by direction of the Supreme Court Clerk for transmission from this Court to the Supreme Court.

The Global Alliance for Preserving the History of WWII (Global Alliance) respectfully requests that the opinion in this case be ordered published. Met are multiple criteria for publication set out in California Rule of Court 8.1105(c) including subsections (2), (6), and particularly (7), involving legal issues of continuing public interest. The Supreme Court has my letter in

support of publication submitted to and rejected by the Court of Appeal and I now write to briefly update my letter and respond to the order issued by the lower court.

Applicant here, the Global Alliance, was granted amicus status by the Ninth Circuit Court of Appeals in the completely parallel federal litigation concerning the same parties and issues, *Gingery v. City of Glendale*, 831 F.3d 1222 (9th Cir. August 4, 2016) which is presently the subject of a recently filed petition for writ of certiorari in the United States Supreme Court (No. 16-917). Since decided by the Ninth Circuit, plaintiff Gingery died, and the petition was filed in the name of co-plaintiff Koichi Mera as *Mera v. City of Glendale*.

As set out in my letter to the Court of Appeal, the Global Alliance is a nonprofit, nonpartisan, worldwide federation of more than 40 grassroots organizations. Founded in 1994, it has as its mission the examination and analysis of the history of the Asia-Pacific War (1931-1945). It is a California nonprofit charitable and educational corporation, and has tax-exempt status under both California law and I.R.C. § 501(c)(3). Its chartered member organizations are located in several countries, including the United States, Canada, Taiwan, China, Japan, and Malaysia.

The Global Alliance is focused on public education and has organized numerous international conferences and educational tours in the U.S. and other countries, including Japan, China, Korea, and Canada. It assisted in the research for, and publication of, several books, including the influential bestseller The Rape of Nanking: The Forgotten

Holocaust of World War II, by Iris Chang, first published in 1997. It supported federal legislation signed in 2000 providing for declassification in the United States of Japanese war crimes records, legislation in California, New York, and other states, and United Nations resolutions and reports regarding Japanese war crimes and has assisted in the publication of many history textbooks and reference materials.

The Global Alliance's work regarding "Comfort Women" has included participation in research and investigation for the resulting lawsuit filed in the U.S. District Court for the District of Columba in September 2000 by former such victims of several nations. *See Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003).

The state and federal *Gingery v. City of Glendale*, and pending Supreme Court cert petition matters concern a city's erection of a "Comfort Women" statue in a public park that sparked substantial controversy. Other cities in the United States have and continue to experience similar "Comfort Women" statue controversies regarding government expression. The very issue of public place "Comfort Women" statues, similar to the one at issue in this case, have been of substantial controversy in many cities in the United States, including several in California such as San Francisco, Fullerton, Monterey Park, Milpitas, Cupertino and elsewhere in the United States, including Fairfax, Virginia, Palisades Park, New Jersey, Westbury, New York, and elsewhere.

The publication of this opinion would serve to provide clarity on the application of the first amendment to government speech generally, and specifically on the continuing controversy of "Comfort

Women" statutes. I am aware of the inclination of some cities to erect a statue but dissuaded by fear of litigation as Glendale experience. Publication would give further authority for those cities to consider. The Court of Appeal decision does more than deal with the SLAPP statute, here in unique circumstances, and addresses a number of areas of law of continuing public interest, including foreign affairs federal preemption. I would hope that in the future, publication will be more favored following a trend otherwise.

For these reasons, it is requested that the opinion he published.

Respectfully submitted,

Barry A. Fisher
Counsel to Global Alliance