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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHIKO SHIOTA GINGERY, an individual, KOICHI MERA, an individual, GAHT-US Corporation, a California non-profit corporation,

Plaintiffs,

vs.

CITY OF GLENDALE, a municipal corporation, SCOTT OCHOA, in his capacity as Glendale City Manager,

Defendants.

Case No. 2:14-cv-1291-PA-AJW

Assigned to: Hon. Percy Anderson

DEFENDANT CITY OF GLENDALE'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE 425.16

[Filed concurrently with Glendale's Motion to Dismiss or Strike, Request for Judicial Notice, Declarations of Christopher S. Munsey and Karen Cruz, and [Proposed] Orders]

Date: May 12, 2014
Time: 1:30 p.m.
Place: Courtroom 15

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE THAT on May 12, 2014, at 1:30 p.m.,[1] before the Honorable Percy Anderson in Courtroom 15 of the United States District Court for the Central District of California, located at 312 N. Spring 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, and GAHT-US Corporation's ("Plaintiffs") Complaint on the following grounds:

1. Plaintiffs' first cause of action fails to assert any cognizable federal rights or claims because there can be no foreign affairs "preemption" of conduct that is purely expressive, such as that at issue here. Plaintiffs' entire case seeks to overturn the City's placement of a monument in a park that honors certain victims of war crimes, thereby squelching the message the monument conveys. Plaintiffs do not challenge any City action that regulates behavior, creates duties, or creates or limits rights. 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.

2. Plaintiffs' mistaken contention that the City violated its charter by not complying with the Robert's Rules of Order 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 was fully consistent with Robert's Rule of Order.

The City's Motion is based upon this Notice of Motion and Motion; the attached Memorandum of Points and Authorities; the City's concurrently-filed Motion to Dismiss and/or Strike pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(6), and 12(f); the concurrently-filed Request for Judicial Notice; the Declaration of Christopher S. Munsey; the Declaration of Karen Cruz; any and all pleadings and

[1] The hearing date is the first available hearing date that is permitted pursuant to the Local Rules and the Court's docket.

papers on file in this case, including but not limited to the Complaint; 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.

This motion is made following the conference of counsel pursuant to Central District Local Rule 7-3, which took place on March 20, 2014.

Dated: April 11, 2014

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND STATEMENT OF FACTS

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, otherwise known as the "Comfort Women," Plaintiffs Michiko Shiota Gingery, Koichi Mera, and GAHT-US Corporation ("Plaintiffs") filed this lawsuit for the sole purpose of compelling the City of Glendale (the "City") to remove it.[2]

Plaintiffs contend the Monument must be removed because it expresses an allegedly "unfairly one-sided" account of this historical event (Complaint, ¶ 6); honoring the victims of these war crimes is supposedly "highly offensive" (*id.*, ¶ 50-51); and the Monument somehow "intrudes" upon the United States Government's foreign affairs power. (*Id.*, ¶ 55.) Plaintiffs also seek to (permanently) remove the Monument by wrongly asserting that the City's approval of the statue violated Robert's Rules of Order. (*Id.*, ¶ 68-69.) As explained below, Plaintiffs' Complaint is a classic example of a strategic lawsuit against public participation (a "SLAPP" suit), presenting a baseless challenge to rights of petition and expression.

Plaintiffs' claims cannot bear slight scrutiny. As to the first, labeled "Unconstitutional Interference With Foreign Affairs Power," citizens do not have any right to invoke the foreign affairs powers of the United States to challenge purely expressive conduct. Every case that has permitted citizens to invoke the foreign affairs power involved defensive challenges to a state statute, regulation or ordinance[3]

[2] The Glendale City Council approved the Monument at a Special Meeting on July 9, 2013. *See* Declaration of Karen Cruz, Exh. A. At the meeting, Glendale Community Relations Coordinator Dan Bell explained to the City Council that the Monument would include a plaque with an inscription stating that the Monument is "commemorating and in honor of the Comfort Women." (Complaint, ¶ 30.)

[3] In some instances, the parties challenging the statute, regulation or ordinance were ostensibly the plaintiffs, but they were reacting to some form of enforcement action that had been and/or was about to be initiated against them or a regulation that would affect their legal rights and duties.

that imposed some requirement or penalty upon them. None of those cases permitted individuals to pursue affirmative claims to challenge a state or local government's allegedly "offensive" speech. Tellingly, the alleged harm Plaintiffs seek to redress in this case – their "discomfort" and "anger" (Complaint, ¶ 7) – is in no way tethered to the foreign affairs power of the United States government, which does not empower the judiciary to protect a citizen's personal views and sensibilities on issues of foreign affairs.

Furthermore, the Ninth Circuit and California Supreme Court have recognized that "[c]ities, 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 on matters "such as foreign policy and immigration." *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996); *see also Farley v. Healey*, 67 Cal. 2d 325, 328 (1967) ("city councils have traditionally made declarations of policy," including with respect to issues of foreign policy, where they lacked "power to effectuate such declarations by binding legislation"). There is no legally cognizable basis upon which to ground a newly-invented federal right that would bring an abrupt end to such longstanding traditions.[4]

The second cause of action fails because: (1) an alleged failure to comply with Robert's Rules of Order does not provide a sufficient basis to state a claim as a matter of law; and (2) in any event, the City of Glendale's installation of the Monument complied with those rules.

In response to a "disturbing trend" of meritless actions designed to chill free speech and petitioning activity – like this one – the California Legislature enacted California Code of Civil Procedure Section 425.16. The statute permits a defendant to

[4] There are a number of other reasons why the first cause of action fails, including that Plaintiffs lack standing and present a nonjusticiable political question, which are addressed in the City's concurrently filed Motion to Dismiss and/or Strike pursuant to Federal Rule of Civil Procedure 12(b)(1),12(b)(6), and 12(f).

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.[5] Moreover, the Ninth Circuit has consistently applied California's anti-SLAPP statute to actions filed in federal court. This is because federal courts recognize the important interests furthered by the anti-SLAPP statute, namely, the early disposal and discouragement of SLAPP suits. *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-71 (9th Cir. 1999). Furthermore, application of the anti-SLAPP statute in federal court promotes the twin aims of the *Erie* doctrine: "discouragement of forum-shopping and avoidance of inequitable administration of the law." *Id*. at 973 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)).[6]

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 Broadcasting 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*.; *accord Plumleigh v. City of Santa Ana*, 754 F. Supp. 2d 1201, 1206 (C.D. Cal. 2010). Where the plaintiffs cannot meet the required showing, the Court must dismiss their complaint. *Seelig*, 97 Cal. App. 4th at 809.

[5] *See Vargas v. City of Salinas*, 46 Cal. 4th 1, 16-19 (2009) (extending anti-SLAPP protections to the city for communications on a public issue or issue of public interest); *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1116 (1996) (holding that the anti-SLAPP statute applies to government comment on a matter of public interest).

[6] Courts have generally limited the statute's application to state law claims, observing that a state statute should not be allowed to interfere with substantive federal rights. *See, e.g., Bulletin Displays, LLC v. Regency Outdoor Advertising*, 448 F. Supp. 2d 1172, 1180 (C.D. Cal. 2006). As explained below, those cases are inapposite where, as here, the claimed "federal right" does not exist.

For the reasons addressed below, Plaintiffs will be unable to establish that they have asserted any cognizable federal right and any probability of success on their remaining claim. Accordingly, the Court should dismiss this lawsuit under California Code of Civil Procedure Section 425.16.

ARGUMENT

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

Under the first prong of the test as to whether the anti-SLAPP statute applies, the Court must determine whether Plaintiffs' lawsuit arises from acts by the City in furtherance of its right of petition or free speech, as defined in section 425.16(e) of the statute. *Haight Ashbury*, 184 Cal. App. 4th at 1548. The City meets that showing here for multiple, independent reasons, including because Plaintiffs' lawsuit involves a challenge to: (1) statements made in public proceedings; (2) statements made in connection with issues reviewed in public proceedings; (3) statements made in a place open to the public or "a public forum in connection with an issue of public interest" and/or (4) an exercise of the right of free speech under the federal or California Constitutions in connection with a public issue and/or issue of public interest. Cal. Civ. Proc. Code § 425.16(e). Meeting any one of these criteria is sufficient to invoke the protections of the anti-SLAPP statute.

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/or federal Constitution and addresses an issue of public interest. Indeed, there can be little doubt that the construction of a statue constitutes expressive conduct, which satisfies the anti-SLAPP statute, regardless as to whether that conduct was performed by a municipality. *See, e.g., Vargas v. City of Salinas*, 46 Cal. 4th 1, 17 (2009) ("we believe it is clear, in light of both the language and purpose of California's anti-SLAPP statute, that the statutory remedy afforded by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity"); *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1115 (1996) (California courts have rejected the "argument that the First Amendment protects private citizens but not a governmental entity"; the anti-SLAPP statute applies to government comments respecting a matter of public interest). Federal courts have likewise recognized that cities have free speech rights protected by California's anti-SLAPP statute. *See, e.g., Fabbrini v. City of Dunsmuir*, 544 F. Supp. 2d 1044, 1050-51 (E.D. Cal. 2008) (finding that the city's press release and news article were protected activity for anti-SLAPP purposes as they concerned issues of public interest).[7]

Moreover, the crimes against the Comfort Women are plainly a public issue or an issue of "public interest." Courts in California have defined "public interest" as

[7] The United States Supreme Court has not expressly held that cities have "First Amendment" rights under the United States Constitution. However, the Court and other federal courts have acknowledged that expressive conduct of municipalities is protected. *See, e.g., Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009) (noting that a "government entity has the right to 'speak for itself'" and stating that "[t]he placement of a permanent monument in a public park is a form of government speech"); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 643-45 (9th Cir. 2009) (applying the *Noerr-Pennington* doctrine—which is derived from the First Amendment—to government actions). Moreover, as explained in the City's concurrently filed Motion to Dismiss, there are compelling reasons for the Court to conclude that the First Amendment protects the City's conduct as well. In any event, because City's conduct is unquestionably protected under the California Constitution, the anti-SLAPP statute's requirements are satisfied. *Fabbrini*, 544 F. Supp. 2d at 1050-51. The anti-SLAPP statute applies to an exercise of rights under the federal ***or*** California Constitution.

"*any issue in which the public is interested*." *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008). 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 scope of 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 below and in the City's concurrently-filed Motion to Dismiss and/or Strike pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(6) and 12(f) (the "Motion to Dismiss"), the crimes committed against the Comfort Women have been (1) addressed by a resolution of the United States House of Representatives; (2) recognized by the Japanese Government in an official resolution in 1993, which was affirmed by Japan's current Prime Minister as recently as last month; (3) repeatedly recognized by the United States government, including in official State Department Reports; and (4) addressed by resolutions of and the construction of monuments in various other municipalities. (*See* Motion to Dismiss at 2-6.) Furthermore, 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) (issues concerning violence against women are an issue of public interest). Consequently, the City's conduct was performed in connection with an issue of public interest and, thus, Section 425.16(e)(4) is satisfied.

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

Thus, although the City need only establish that it satisfies the requirements of one subsection in Section 425.16(e), the City satisfies all of them here. As such, there is no question that the anti-SLAPP statute applies to this action.

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). Plaintiffs cannot meet their burden, because they have no right to challenge the Monument under the foreign affairs power, and their second cause of action fails both legally and factually.[8]

A. Plaintiffs' First Cause of Action is Subject to Dismissal

1. The Court Should Apply the Anti-SLAPP Statute to Plaintiffs' First Cause of Action Because it Fails to Identify Any Real Federal Right

Citing the general principle that state statutes should not interfere with substantive federal rights, courts have generally held that Section 425.16 does not apply to claims seeking to vindicate federal rights. However, those cases do not address the situation presented here, where there is no actual federal right at issue. In these circumstances, the underlying rationale limiting application of the anti-SLAPP statute does not apply.

To begin with, there is no basis for Plaintiffs' challenge to the City's purely expressive conduct on the grounds that under the U.S. Government's foreign affairs power the act of placing a statue in a public park is somehow "preempted." To the contrary, every case that has held that state or local action was preempted under the foreign affairs doctrine has dealt with laws with actual regulatory and coercive effect, and not with, as is at issue here, purely expressive conduct.[9] In those cases, the statute

[8] As set forth in detail in the City's Motion to Dismiss, several additional independent grounds exist to order the First Cause of Action dismissed. However, this motion is based solely on the ground that the claimed "federal right" sued upon does not exist.

[9] *See Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012) (state law providing a private right of action and suspending statute of limitations for claims against insurance companies by survivors of the Armenian Genocide and their beneficiaries;

or regulation at issue created actual duties, obligations, and/or restraints on economic activity, which in turn gave rise to the invocation of the Supremacy Clause and the federal government's foreign policy authority. The City is aware of no case providing a general right to bring into federal court a challenge to non-regulatory, expressive conduct under the guise of foreign affairs "preemption." Accordingly, Plaintiff's have identified no valid federal claim to assert.

Notwithstanding that Plaintiffs have styled their first cause of action as a federal claim, where a litigant merely invents purported federal rights that do not exist, and no valid federal question is actually present, it is fully consistent with both the limitations on the jurisdiction of Article III courts and the California Legislature's goal of preventing meritless lawsuits designed to chill free speech and petitioning activity to apply Section 425.16. Indeed, all of the relevant factors courts consider militate in favor of applying the anti-SLAPP statute to Plaintiff's first cause of action:

1. California's Interest in Preventing SLAPP suits. The Ninth Circuit has recognized that California has important interests furthered by the anti-SLAPP statute, namely, the early disposal and discouragement of SLAPP suits. *See Newsham*, 190

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preemption raised as a defense to such claims); *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; preemption raised as a defense to such a lawsuit); *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; preemption raised as a defense to such claims); *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (requiring insurers doing business in California to make extensive disclosures of information to state regulators for potential use by private litigants in lawsuits regarding the Holocaust); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (statute barring state entities from doing business with companies that did business in Burma or with the Burmese government); *Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968) (statute requiring nonresident aliens to demonstrate, in order to receive inheritance, that the country from which the alien came granted various reciprocal rights to United States citizens, which resulted in state court judges conducting detailed inquiries into the political systems and conduct of foreign nations); *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942) (state policy against confiscation could not prevent U.S. government from taking title to property nationalized by Soviet Government and assigned to U.S. pursuant to a diplomatic agreement with the U.S.S.R.); *United States v. Belmont*, 301 U.S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937) (same).

F.3d at 970-71, 973. This factor weighs heavily in favor of applying the anti-SLAPP statute to Plaintiffs' first cause of action, which is nothing more than a challenge to the "long tradition of issuing pronouncements, proclamations, and statements of principle on a wide range of matters of public interest," including on matters "such as foreign policy and immigration." *Alameda Newspapers*, 95 F.3d at 1414; *Farley*, 67 Cal.2d at 328 ("city councils have traditionally made declarations of policy," including with respect to issues of foreign policy, where they lacked "power to effectuate such declarations by binding legislation").

Moreover, permitting Plaintiffs to evade the anti-SLAPP statute by inventing and asserting non-existent federal rights would significantly diminish its protections. Indeed, as courts have recognized, persons initiating SLAPPs oftentimes do not care whether they win. Many times, the SLAPP plaintiff only wants to "deplet[e] the defendant's energy and drain[] his or her resources," discouraging the defendant and similarly situated persons from exercising their rights. *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1074 (2001). To avoid these results, courts should apply the anti-SLAPP statute to claims that assert non-existent federal rights.

2. Forum Shopping. Applying the anti-SLAPP statute to purported claims asserting non-existent federal rights will also inevitably reduce forum shopping. As the Ninth Circuit has recognized, "if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum." *Newsham*, 190 F.3d at 973; *see also Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1187 (9th Cir. 2013) ("Without anti-SLAPP protections in federal courts, SLAPP plaintiffs would have an incentive to file or remove to federal courts strategic, retaliatory lawsuits that are more likely to have the desired effect of suppressing a SLAPP defendant's speech-related activities."). Indeed, if individuals are permitted to avoid the anti-SLAPP statute by inventing a federal right out of whole cloth, it will increase the likelihood that meritless SLAPP suits will be initiated in federal court.

Thus, this factor also weighs strongly in favor of applying the anti-SLAPP statute to Plaintiffs' first cause of action.

3. A Litigant's Interest in a Federal Right. In *Bulletin Displays*, 448 F. Supp. 2d 1172,[10] the District Court held that the reason why the anti-SLAPP statute does not apply to "federal question claims in federal court [is] because such application would frustrate ***substantive federal rights***." *Id.* at 1180 (emphasis added). Here, however, that consideration does not apply, because Plaintiffs do not have any "substantive federal rights" to challenge the Monument in the first place.

4. The Uniform Administration of Justice. In addition, the Ninth Circuit has held that courts should consider whether the application of the anti-SLAPP statute might lead to the "inequitable administration of the law." *See Newsham*, 190 F.3d at 973 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)). Thus, the Ninth Circuit has applied the anti-SLAPP statute to state law claims in federal court, reasoning that a defendant's available defenses to a state law claim should not change depending upon the forum. Conversely, with respect to an ***actual*** federal claim, the Ninth Circuit has not been willing to apply the anti-SLAPP statute, because, again, a defendant's defenses to an actual federal claim should not change depending on the state where he resides. *See Bulletin Displays*, 448 F. Supp. 2d at 1182.

However, because Plaintiffs cannot identify any substantive federal right available to them, no "inequitable" result will ensue. No matter the state in which a litigant resides, he will never have a right to assert claims challenging government speech under the foreign affairs power or the Supremacy Clause of the Constitution, under Section 1983 or otherwise. Furthermore, the harm alleged by Plaintiffs (some form of emotional distress) is more typically pleaded in connection with state law tort

[10] The Ninth Circuit relied upon *Bulletin* without further explanation in determining that California's anti-SLAPP statute does not apply to cognizable federal claims. *See Hilton v. Hallmark*, 599 F.3d 894, 901 (9th Cir. 2010).

claims for intentional and/or negligent infliction of emotional distress. That is, if it were anything at all, the first cause of action would be a state tort claim of some kind seeking to redress alleged personal injuries.[11] Consequently, this factor also militates in favor of applying the anti-SLAPP statute to Plaintiffs' first cause of action.

For these reasons, the Court should apply the anti-SLAPP statute to Plaintiffs' first cause of action, which does not pose a federal question or even state a cognizable federal claim.

2. 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 *any* enforceable rights, regulate *any* behavior, or impose *any* liabilities, there is simply no law to be preempted. Notably, in *Movsesian* (a recent *en banc* decision by the Ninth Circuit), the court specifically observed that the statute 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." 670 F.3d at 1077. The court explained that it 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. Initially, the Ninth Circuit has recognized, "[c]ities, counties,

[11] The Ninth Circuit has recognized that "a plaintiff may not avoid federal jurisdiction . . . by casting in state law terms a claim that can be made only under federal law." *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 344 (9th Cir. 1996) (internal quotation marks omitted). Moreover, where a substantial federal issue is embedded in a state-law claim, a federal court has federal question jurisdiction even if all claims were pled as state-law claims. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). The inverse should also apply where, as in the instant action, a plaintiff seeks to avoid the application of state law by characterizing what is essentially a state-law claim as a non-existent federal claim. The extension of the general rule against this type of "artful pleading" to actions like the one currently before the court serves both state and federal interests for the same reasons articulated above.

and states have a long tradition of issuing pronouncements, proclamations, and statements of interest on a wide range of matters of public interest, including . . . matters subject to preemption, such as foreign policy . . . ." *Alameda Newspapers, Inc.*, 95 F.3d at 1414; *see also Farley*, 67 Cal.2d at 328[12]; *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470, 480, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009) ("Governments have long used monuments to speak to the public," including regarding controversial foreign policy issues, as is the case with "war memorial[s]"). A rule, such as the one Plaintiffs propose, that prevented local governments from communicating on issues of public concern would be "antithetical to fundamental principles of federalism and democracy." *Alameda Newspapers, Inc.*, 95 F.3d at 1415.

Indeed, if Plaintiffs' legal theory were recognized, it would suddenly call into question an enormous swath of state and local action. For example, states and localities regularly make proclamations and pronouncements honoring historical events and stating their values, including on issues touching on foreign policy. (*See, e.g.*, Declaration of Christopher S. Munsey ("Munsey Decl."), Exh. 1 at 7-9 (document listing proclamations and resolutions regarding issues relating to foreign policy)). 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.

States also often mandate the teaching in public schools of historical issues that touch on foreign affairs. For example, the California State Board of Education, pursuant to state law, published the History-Social Science Framework and the

[12] "As representatives of local communities, *boards of supervisors and 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).

History-Social Science Content Standards for Public Schools ("Content Standards"). These documents identify issues and topics that students in California public schools are required to study "at each grade level from kindergarten to grade twelve." (*See* Exh. 2 to Munsey Decl. at 12-16 (Content Standards)). These materials mandate that students learn about a number of controversial historical events. In grade ten, students learn about "human rights violations and genocide, including the Ottoman government's actions against Armenian citizens." (*Id.* § 10.5.) Students are also required to learn about "Stalin's rise to power in the Soviet Union," including "systemic violations of human rights" like the "Terror Famine in Ukraine." (*Id.* § 10.7.) As 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, other atrocities in China, and the Stalin-Hitler Pact of 1939," as well as to learn about "the Nazi policy of pursuing racial purity, especially against the European Jews; its transformation into the Final Solution; and the Holocaust that resulted in the murder of six million Jewish civilians." (*Id.* § 10.8.) In grade 11, students "[e]xamine the origins of American involvement in [World War II], with an emphasis on the events that precipitated the attack on Pearl Harbor," as well as the "internment of Japanese Americans," and "the decision to drop atomic bombs and the consequences of the decision [on] Hiroshima and Nagasaki." (*Id.* § 11.7.) The California Department of Education has also published a Model Curriculum for Human Rights and Genocide ("Model Curriculum"), which addresses all of the issues above, and includes in a list of suggested resources a book entitled, "*Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War*." (*See* Exh. 28 to Munsey Decl. at 121-22 (Model Curriculum)). These important topics of public school instruction would be endangered if states and localities were, as Plaintiffs suggest, forbidden from addressing historical issues of public significance the moment they were called into question by a foreign government.

Plaintiffs' novel legal theory would also jeopardize not just the expressive Monument at issue here, but numerous statues, monuments, and museum exhibits commemorating historical events around the country that were erected by state and local governments. (*See, e.g.*, Exh. 1 to Munsey Decl. at 9-10 (document listing statues, memorials, and monuments commemorating historical events that implicate foreign policy issues)).

Plaintiffs attempt to prop up their claim with citations to the negative reactions of a number of Japanese politicians to the Monument. (Complaint, ¶¶ 37-42.) However, holding that such 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 were sufficient to justify preemption, 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.

If Plaintiffs disagree with the view of historical events expressed by the Monument, their remedy is *more* speech, not less, and resort to the ballot box. *See, e.g., Summum*, 555 U.S. at 468-69 ("a government entity is ultimately accountable to the electorate and the political process for its advocacy . . . If the citizenry objects [to the message of government speech], newly elected officials later could espouse some different or contrary position") (internal quotation omitted). They have no right to stifle Glendale's expression by resorting to the federal court system.

3. Plaintiffs Also Cannot Bring An Action Under Section 1983

Plaintiffs claim to sue under 42 U.S.C. § 1983, but also fail to 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." *Gonzaga University v. Doe*, 536 U.S. 273, 285, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) (internal quotations omitted). "[Section] 1983 merely provides a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws' of the United States." *Id*. Thus, to assert a valid cause of action under Section 1983, a plaintiff must identify a Constitutional provision or federal law that is a source of individual rights. Here, Plaintiffs have failed to do so.

First, although Plaintiffs allege that the Monument violates the Supremacy Clause, U.S. Constitution, art. VI, cl.2, the Supremacy Clause is not a source of individual rights cognizable under Section 1983. *See, e.g., Henry v. Homecomings Financial*, 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, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989) ("the Supremacy Clause . . . does not create rights enforceable under § 1983")).

Second, Plaintiffs also refer to the sections of the Constitution dealing with the United States' foreign affairs powers. *See* Complaint, ¶ 1 (citing U.S. Const. art. II, sec. 1, cl. 1; sec. 2, cl. 1; sec. 2, cl. 2; sec. 3). These are also not a source of individual rights under Section 1983 and, as previously explained, cannot be invoked under the circumstances presented here in any event. *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"); *see also White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th

Cir. 1985) ("1983 was not intended to encompass those constitutional provisions which allocate power between the state and federal government"). Accordingly, no Section 1983 claim may be stated for their purported violation either.

Finally, Plaintiffs do not even attempt to identify a federal statute providing them individual rights that the non-regulatory Monument at issue here violated. Accordingly, Plaintiffs cannot state a valid claim under Section 1983.

Thus, Plaintiffs fail to allege any valid federal rights they seek to vindicate. Their first cause of action is therefore subject to dismissal.

B. Plaintiffs' Second Cause of Action 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.*; *see also The California Municipal Law Handbook*, (Cont. Ed. Bar 2013 ed.) § 2.45, p. 127 ("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, modify its own parliamentary rules, and therefore a measure passed in compliance with the charter will not be void simply because in its passage one of the parliamentary rules 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 City of Glendale, California Charter (the "Charter")

provides the Council with the power to accept gifts on behalf of the City,[13] but does not require Council to review all the details of the gift prior to its acceptance. (Exh. 3 to Munsey Decl. at 20-21, 23 (Charter, Art. III § 18, Art. VI § 4.))

In this case, the Council voted to accept the Monument and install it in Central Park. (Complaint, ¶¶ 26-27, 29.) It did so knowing that the Monument would have a plaque with language "commemorating and in honor of the comfort women" that was yet to be determined, which is precisely what it does. (*Id*., ¶¶ 30, 69.) The Council never showed the intent to reserve the specific language on the plaque for its later review and approval. (*See id*., ¶ 30.) Instead, the Council voted to accept the Monument even though it was advised that the language had not been finalized. (*Id*., ¶ 69.) 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.

Moreover, Plaintiffs Koichi Mera and GAHT-US have not identified any basis for their purported state law challenge to the Monument, as neither is a resident of Glendale.[14]

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[13] (*See* Exh. 3 to Munsey Decl. at 21 (Charter Art. III, § 2, ¶ 18).)

[14] GAHT-US asserts, in conclusory fashion, that it has members who are residents of Glendale, but fails to identify even a single such member.

CONCLUSION

Plaintiffs' misguided resort to this Court in an attempt to force the City to remove the message the Monument conveys from a public park is precisely the type of claim the California Legislature sought to prevent when it passed California's anti-SLAPP statute. Plaintiffs should not be allowed to avoid its application by claiming to pursue a federal right that does not exist. For all the foregoing reasons, the City respectfully requests that the Court strike Plaintiffs' Complaint in its entirety pursuant to Section 425.16.

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