

CASE NO. 14-56440

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

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

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

**BRIEF OF *AMICUS CURIAE* THE NIPPON TODAY'S RESEARCHERS
SOCIETY (KINGEN) IN SUPPORT OF PLAINTIFFS AND APPELLANTS
PETITION FOR RECONSIDERATION *EN BANC***

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BRIEF OF AMICUS CURIAE

CORPORATE DISCLOSURE STATEMENT.

The Nippon Today’s Researchers Society (KINGEN) is a not-for-profit, non-governmental organization based in Japan. KINGEN receives no financial assistance from any outside group, and is wholly funded by donations from its members. KINGEN has no corporate parent and no other organization has an ownership interest in KINGEN.

INTEREST OF AMICUS.

Interest of the amicus. KINGEN has great interest in understanding the controversial issue of the “Comfort Women,” and has collected a wide range of information and related documents on the subject. KINGEN has a distinctly different view on the “Comfort Women” as compared to the views expressed in *amicus* briefs submitted to the Ninth Circuit Court of Appeals by the interest groups, Korean American Forum of California (“KAFC”) and the Global Alliance for Preserving the History of WWII in Asia (“GAPH”). Because the Ninth Circuit panel accepted those briefs and presumably considered them in rendering its opinion, the KINGEN feel compelled to present our own findings to the Court in support of the plaintiff-appellants’ motion for reconsideration *en banc*.

The members of KINGEN have studied Japanese history from various angles, and believe that the current controversy over the “Comfort Women” is driven by a pro-Korean political agenda, coordinated by pro-Korean organizations, with an objective to dishonor and shame the Government of Japan and the Japanese and thereby lower its international standing.

Japanese scholars take exception to the theory that the “Comfort Women” were sex slaves, and argue that the characterization is taken out of its proper historical context and that it is not based on sound historical evidence. In this *amicus* brief, KINGEN wishes to provide the Court with context and reliable sources of information which support the Japanese denial of the “sex-slave” theory, and explains the position of the Japanese government on the issue of “historical responsibility” on the accusation of war crimes by Glendale and pro-Korean groups.

STATEMENT OF AUTHORSHIP AND FUNDING.

Counsel for Plaintiff-Appellants had no involvement in the preparation of this brief or the accompanying motion. Counsel for KINGEN is not counsel for any party in this action. However, undersigned counsel discloses to the Court that he represented Plaintiff-Appellants for approximately four months in 2014, commencing *after* the motion to dismiss was fully briefed and ending in October 2014, *before* any briefing on the appeal commenced. Counsel further advises the Court that no confidential information of funds from any party was used in the preparation of this brief or the accompanying motion.

Neither any party nor any counsel for any party contributed any money that was intended to fund preparing or submitting the brief or the accompanying motion. No person - other than *Amicus*, its members, or its counsel - contributed money that was intended to fund the preparation or submission of this brief or the accompanying motion.

ARGUMENT

I. INTRODUCTION.

Glendale has installed a permanent monument in a public park – in stone and bronze – which sets forth a disputed and controversial view of history. Glendale espouses the point of view of Korean interest groups that over 200,000 “Comfort Women,” were “sex slaves” during World War II, and demands that Japan “take historical responsibility” for alleged war crimes.

KINGEN respectfully submits that these statements are not appropriate nor supported by the historical record, and reflect a strongly pro-Korean interpretation of the issue, to the detriment of Japan, resulting in anti-Japanese discrimination in Glendale. Further, Glendale has violated the First Amendment by permanently endorsed one viewpoint while excluding others. In so doing, the panel improperly expanded the scope of *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) – dealing with symbolic speech—and *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996)—dealing with a (non-permanent) written resolution or proclamation. This is an entirely new statement of the law: that a city can adopt the foreign policy statement of an interest group, in bronze and stone, in a public park, that a foreign nation should be held accountable for war crimes over the objection of its citizens.

The new rule announced by the panel allows statements in favor of a controversial foreign policy agenda of an interest group to be set in stone in a public park. This invites municipalities to engage in all manner of viewpoint-discriminatory speech in public fora by conflating “*merely expressive*” monuments with proclamations.

II. JAPAN DENIES THAT THE “COMFORT WOMEN” WERE ENSLAVED.

A. The “Kono Statement” Was a Diplomatic Compromise.

In the spring of 2014, the government of Japan began aggressively denying the accusation that the “Comfort Women” were enslaved. The Kono Statement, announced on August 4, 1993, was interpreted as an admission to police and military coerced recruitment of the “Comfort Women.” But the statement reveals no use of the words “abduct,” “slave,” nor an admission that these women were “enslaved by the Japanese Military.” However, Kono Statements caused serious misunderstandings internationally, so a blue-ribbon panel of Japanese experts revisited the statement in Spring 2014.

On June 20, 2014, the commission concluded that the Kono statement was not a factual admission of abduction/enslavement of “Comfort Women,” but rather a diplomatic concession to Republic of Korea (“ROK”), a formal apology but not an admission of fault, that was intended to bring an end to the dispute.

On February 20, 2014, a high-ranking Japanese official expressed disappointment at the reversal by the ROK. (*Appendix*, Exhibit A.) Japan felt compelled to support the fragile country of South Korea in its fight against communist threats, especially in the Korean War, during the cold war, and even into the 1990's, in order to maintain warm diplomatic relations with the ROK to keep Japan's good standing with the USA. (See *Id.*)

B. Japan Has Denied the Allegations on Four Separate Occasions.

Following the 2014 study, Japan addressed the issue of “Comfort Women” in great detail. Japan explicitly and specifically denied forcible recruitment (abduction or slave hunting), slavery, and the claim that “Comfort Women” numbered 200,000. Japan named ASAHI Newspaper as a propagandist and the main disseminator of alleged disinformation. Japan's official denial started with a statement before the UN Human Rights Committee (CCPR) on July 15, 2014, and Japan's denial has been repeated four times. (**Exhs. B, C, D, E & G [summary prepared by KINGEN]**.) Japan's position to the international community directly contradicts Glendale's accusations, as Japan maintains:

- These are one-sided claims which lack corroborative evidence;
- There is no documentation of state-sponsored abductions of women,
- The claim of “200,000 comfort women” is based upon confusing “Comfort Women” with women volunteer corps.

- The phrase expression “sex slaves” contradicts the facts and it is inappropriate to consider the comfort women system as "slavery" from the perspective of then-current international law.
- Japan objects to the allegation of historical revisionism and maintains it has fully addressed the issue “Comfort Women.”

III. **JAPAN DISAPPROVES OF GLENDALE’S MONUMENT TO THE “COMFORT WOMEN.”**

Glendale has disrupted the relationship between Japan and the USA. Japan has expressed support for this citizen lawsuit against the monument in Glendale, and expressed disapproval of another very similar statue in Seoul.

A. **Japan Calls Glendale’s Monument “Incompatible” and “Regrettable.”**

On February 21, 2014, the day after plaintiffs filed this action, Mr. Yoshihide Suga, Chief Cabinet Secretary of Japan, gave a press conference, stating: “This installation of a memorial statue by a municipal government in the U.S. is incompatible with the views of the Japanese Government,” and “extremely regrettable.” Mr. Suga expressed solidarity with the plaintiffs, Japanese, and Japanese-Americans. (Exhibit F)

B. **Another Diplomatic Compromise on “Comfort Women”: Japan-Korea Agreement of 2015**

On December 28, 2015, the Japan-Korea Agreement on “Comfort Women” was announced and the Foreign Minister of ROK, Mr. Yun, specifically addressed the “Comfort Woman” statue in Seoul, as follows:

The Government of the ROK acknowledges the fact that the Government of Japan is concerned about the statue built in front of the Embassy of Japan in Seoul from the viewpoint of preventing any disturbance of the peace of the mission or impairment of its dignity, and will strive to solve this issue in an appropriate manner through taking measures such as consulting with related organizations about possible ways of addressing this issue. (Exh. H.)

Japan supports for the fragile government of the ROK, in the face of volatile situations in the South and East China Sea, to maintain its alliance with the U.S.A. Nevertheless, Japan requested removal of the statue in Seoul, and the ROK has acknowledged the problem. Similarly, the statue in the Glendale creates friction amongst ethnic groups, and its continued presence in Glendale threatens to destabilize the relationship between the USA and Japan. (Exh. I.)

IV. WHO WERE THE “COMFORT WOMEN”?

According to various reports, “Comfort Women” were recruited through advertisements in newspapers (Exh. 6), proprietors of brothels, employment agencies, panders, and other private individuals. As valuable employees, scholars argue, they were treated with respect. Furthermore, historians claim that as a result of the risk of their work near battlefronts, they received high remuneration. Documents submitted herewith reflect that one “Comfort Woman” deposited in her bank earnings then-equivalent to the purchase price for two houses in Tokyo, in only one year. (Exh. J.)

U.S. Military reports have supported this view of the historical facts. Indeed, the U.S. Government has previously investigated the allegations of atrocities against the “Comfort Women” by the Japanese military, at urging of *amicus* GAPH, without results.

A. U.S. Military Intelligence Report No. 49.

On October 1, 1944, the U.S. issued a report, Japanese Prisoners of War Interrogation on Prostitution Report No. 49, prepared by U.S. Office of War Information, Psychological Warfare Team which was attached to U.S. Army Forces India-Burma Theater, APO 689. (Exh. K.) It is based on interrogations of “Comfort Women” captured by the U.S. in Burma. The report concludes: “A ‘comfort girl’ is nothing more than a prostitute or ‘professional camp followers’ attached to the Japanese Army for the benefit of the soldiers.” (*Id.*, p.1) A summary of the major findings of this report follows:

- “Comfort Women” were recruited by Japanese private-sector agents in May 1942 in Korea for “comfort service,” which was a contract wherein the women or their families were paid in advance
- The women’s age ranged from 21 to 28.
- Each woman lived, slept and transacted business in a private room.
- The report opines that they lived fairly comfortably.
- The report characterizes the relationship between “Comfort

Women” and soldiers as generally amicable and social with numerous instances of marriage proposals and a few marriages.

- The report describes strict regulation to protect the health and safety of the women and their customers.
- The report states that women had time off and were able to refuse a customer if they wished.

(*Id.*) U.S. military interrogations of Japanese prisoners of war in south Asia and southern Pacific areas, held at the U.S. National Archives and Records Administration (NARA), mirror Report No. 49 in the depiction of “Comfort Women” in Manila, the Philippines and Rabaul, Papua New Guinea. (Exhibit L.)

B. Interagency Working Group Report of 2007

In response to the 1998 Nazi War Crimes Disclosure Act, Public Law 105-246, *amicus* GAPH, a Chinese-American organization, persuaded Congress to also authorize and investigation into war crimes by the Japanese resulting in the Japanese Imperial Government Disclosure Act, Public Law 106-567, (2000). The Interagency Working Group (IWG) – consisting of top U.S. government officials—began researching alleged war crimes by the Japanese. After reviewing over 8.5 million pages, little evidence was reported. (Exhibit P.) Acting Chair Steven Garfinkel acknowledged the disappointment of GAPH, who hoped to unearth massive troves of evidence of Japanese war crimes. (Exhibit Q.)

Despite the U.S. acknowledging a lack of documentation, *amicus curiae* GAPH insists on pressing the “enslavement” theory, seeking redress for “Japan's aggression, invasion, and occupation of mainland Asia and island nations of the Pacific.” (Exh. M) But the U.S.A. has no policy regarding “Comfort Women” as a war crime since it was a then-acceptable and legal local practice. (Exh. L, p. 15) But Glendale, following *Amicus* GAPH, ignores the policy of the U.S.

C. Glendale Strains Relations with Japan in Favor of Korea.

Glendale’s monument has alienated its first sister city, Higashi-Osaka. (Exh. U.) According to KINGEN’s study, the mayor of Glendale has visited its relatively new Korean sister cities, Goseong and Gimpo, seven times in the last seven years, but not once stopped in Higashi-Osaka, a few hours from Seoul. By favoring Korea over Japan, Glendale has shunned Japan – an American ally and home of Glendale’s sister city dating back to 1960.

D. About Amicus GAPH

GAPH was established by Chinese-Americans in northern California with the aim of alleging atrocities by the Japanese military during World War II. GAPH helped write The Rape of Nanjing, by Iris Chang, a controversial text that many Japanese scholars argue lacks credible evidence. GAPH lobbied Congress to create the IWG, which ultimately failed to unearth documentation of the Japanese military’s alleged crimes.

Also, GAPH opposes U.S. diplomatic policy by, among other things, claiming that the San Francisco Peace Treaty of 1951 was controversial, and was invalidated in 1972 by a joint communique between Japan and PROC (Exh. M.) GAPH hopes Glendale will generate “a formidable popular consensus (which) will compel [] Japan to honor its postwar responsibilities.” (*Id.*) In short, GAPH is promoting the “Comfort Women” to lower Japan’s standing.

E. Statements of the “Comfort Women”

Historical evidence of Glendale’s narrative relies on narrative statements from self-proclaimed “Comfort Women.” In The Comfort Women (University of Chicago Press, 2008), author Sarah Soh, Professor of Anthropology at San Francisco State University, has rigorously examined the evidence, concluding:

1. “Comfort Women” were not typically kidnapped. (p.3)
2. “Comfort Women” received advance payments when recruited. (p.9)
3. “Comfort Women” numbered 50,000 at most, not 200,000. (p.24)

Professor Park Yuha of Sejong University in South Korea has resisted the pressure to adopt the ROK version of history:

“some well-known Korean [‘Comfort Woman’] survivors (such as Kim Hak-sun, Pae Pong-gi, and most recently, Yi Yong-su) have given different version of testimonial narratives. In particular, the stories of some Korean survivors have varied regarding a crucial issue of the method of their recruitment. ... In the case of Yi Yong-su, the published account states that she left home at dawn when her age-mate and neighborhood friend Pun-sun knocked on her window and whispered, ‘Come out quietly.’ Yi recalled: ‘I

tiptoed out and furtively followed Pun-sun to leave home...without letting her mother know.” (“Comfort Women of the Empire” in 2013 [Korean], 2014 (Japanese, Asahi Newspaper)

But Yi recently revised her statements to allege she was “dragged away by the Japanese military during her sleep” dovetailing with the activists’ paradigmatic discourse.” (Exh. V.)

By contrast, Special Edition of Bulletin of Showa Kenkyujo collects 33 testimonials from military personnel and civilians, recounting conversations with “Comfort Women,” along with Japanese military discipline and attitudes, detailing the strict regulation of soldiers’ visits to “Comfort Stations,” the mandate that natives of occupied territories be treated as equals, and denials of Hitler’s theories of racial supremacy. (Exh. N.) This argues Japanese military was disciplined and that “Comfort Stations” decreased the incidence of rape and prevented disease. (Exhibit O). KINGEN finds these results consistent with prisoners’ interrogation reports. Indeed, KINGEN has found no evidence of kidnapping, no evidence of 200,000 “Comfort Women,” and no mention of sexual servitude. (Exh. W.)

Glendale, and its *amici*, rely almost exclusively on the narratives of self-identified “Comfort Women” to proclaim the Japanese “guilty” of “war crimes.” There has been no tribunal, no sworn testimony, and no such verdict, but the language of the monument in Glendale’s Central Park insists otherwise. Permitting a California municipality to act as judge, jury and executioner in a serious matter

of international import invites perjury, and insults the process of international criminal courts.

Ironically, Glendale’s purported justification for the monument – freedom of expression – actually limits freedom of expression of opposing viewpoints by officially condemning the Japanese military as a criminal.

F. Argument Amongst Academic Historians

Historians are hotly debating the “enslavement” theory, but debate is dead in Glendale Central Park. Those who insist that “Comfort Women” were enslaved have not responded for almost a half year since 50 Japanese historians presented evidence denying enslavement. (Exhibit R).

V. WHAT IS THE REAL PURPOSE OF THE MONUMENT?

Glendale’s monument purports to commemorate “200,000 Sex Slaves,” but significant historical evidence suggests there were a quarter that many and that the “Comfort Women” were “*nothing more than prostitutes or professional camp followers*” (Exh. K.) Indeed, none of the Japanese “Comfort Women” – who as a group constituted the greatest number of these women – have made any accusation of enslavement against the military of Japan, nor have they demanded reparations.

This begs the question: why do the proponents of the monument fail to commemorate victims of sexual exploitation and/or alleged war crimes, at any other time, in any other place? Why does not Glendale commemorate prostitutes

who worked during the Korean War, Vietnam War, elsewhere? KINGEN respectfully submits that the “Comfort Women” theory espoused by Glendale’s monument is a proxy for anti-Japanese sentiment and is part of a campaign to shame and demean the Japanese people, with a goal of Japan’s standing as an ally of the U.S.A.

As evidence, KINGEN has collected images of anti-Japanese demonstrations, rallies and signage around the monuments by Korean and Chinese activists. Although the monuments purport to promote peace, they have become a lightning rod of division. (Exh. S [KINGEN-assembled collage of anti-Japan demonstrations surrounding “Comfort Women” monument].) Therefore, KINGEN maintains that the “Comfort Women” issue is an international political issue, using a hypocritical double standard on women’s rights, in order to marginalize Japan and the Japanese today. There have been many atrocities during wars in history and in the world. To single out Japan and to condemn Japanese persistently, in light of the broader context and the complicated history of this issue is tantamount to state-sponsored discrimination and prejudice against the Japanese people.

VI. PLAINTIFFS AND APPELLANTS CAN STATE A CLAIM.

The panel concluded that Plaintiffs’ complaint should be dismissed without leave to amend; however, in California, plaintiffs have alleged claims under the California Constitution Equal Protection and Privileges and Immunities clauses.

Plaintiffs and Appellants should be permitted to amend their federal complaint in light of the analysis above as Glendale’s pro-Korean position in light of the vigorous international dispute is a state-sponsored proxy for anti-Japanese-American sentiment in Glendale, California.

Plaintiffs Can State a Claim for Violations of their First Amendment Rights.

As alleged in Plaintiffs’ complaint, Glendale decided to adopt the monument’s language – which was provided and supported by a pro-Korean interest group—while ignoring the objecting views of its Japanese citizens. Glendale’s Central Park is a public forum and the City has adopted and set in stone the views of one set of interests while denying the right of others to offer different views of the historical facts and to defend the “trial by monument” in Glendale.

Glendale’s statement in the *written* plaque reads as an out-of-court indictment of Japan--a foreign power—and expresses subtle anti-Japanese animus. The narrative plaque is not a valid “time, place and manner” restriction on speech in a public forum, nor is it mere “expressive speech.”

Rather, the written statement set in stone in Glendale’s Central Park is an impermissible government subsidy of controversial, highly charged, and

internationally relevant speech that adopts the views of a political activist group with anti-Japanese objectives.

In permitting the language of the **plaque** (separately and distinct from the “expressive” monument of a sitting Korean woman) the panel improperly expanded the scope of *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) – dealing with symbolic speech—and conflated it with the holding of this Court in *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1414 (9th Cir. 1996)—dealing with a (non-permanent) written resolution or proclamation.

The result is an entirely new statement of the law: in reading the opinion, a city could adopt the foreign policy statement of any interest group, and cast it in bronze and stone, in a public park, arguing that a foreign nation should be held accountable for war crimes over the objection of its citizens. The rule announced by the panel would permit cities to engage in all manner of viewpoint discriminatory speech in public fora under the guise of “*merely expressive*” proclamations.

Given California’s troubled history of mistreating Japanese residents, this monument and its one-sided view of history can rightfully be seen as the first step on a slippery slope of government-sponsored anti-Japanese sentiment. If the monument and its incendiary narrative stand, nothing prevents Glendale from

adding, as additional “expressive speech,” any manner of divisive or exclusionary rhetoric.

VI. CONCLUSION

The “Comfort Women” monument was promoted, funded and created by Korean interest groups and erected three years ago by the City of Glendale, leading to international tensions and disenfranchisement of the plaintiffs, because Glendale accepted a pro-Korean, anti-Japanese view. Indeed, a very similar statue in Seoul has created diplomatic tensions between Japan and South Korea. Substantial historical evidence and academic scholars question the theory that “200,000 ‘Comfort Women’ were ‘sex slaves’ of the Japanese military,” but Glendale ignored the perspectives of the Japanese and embraced the views of pro-Korean groups. From a Japanese perspective, the monument does not preserve peace nor promote human rights, but rather defames and demeans Japan and the Japanese in the USA.

The Ninth Circuit should rehear the case *en banc* and reverse the ruling of the panel because a failure to act will cause the situation to worsen, resulting in more anti-Japanese monuments promoted by the Korean interest groups, threatening to weaken the U.S.-Japan Security Treaty. Performance of a bilateral security treaty is “greatly dependent on a mutual friendship,” as stipulated in the first line of the first paragraph in the Security Treaty. (Exh. T)

The monument threatens the friendship of Japan and the U.S.A. From the perspective of the Japanese members of KINGEN, the “Comfort Women” monument in Glendale is not just a 20-ton bronze memorial; it is a sharp and subversive dagger aimed at the U.S.-Japan Security Treaty, a Trojan Horse that threatens the safety of the Japanese and Japanese-Americans in Glendale. The opinion of the panel suggests improperly that municipalities can intervene in a global diplomatic issue without regard to U.S. policy or the right of its citizens to have equal access to express their viewpoints in a public forum.

DATED: September 26, 20166 Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionally double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains **3766** words up to and including the signature lines that follow the brief's conclusion. I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on September 26, 2016.

DATED: September 26, 2016 Respectfully submitted,

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