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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **WESTERN DIVISION**

14 AHIMSA WICKREMATUNGE, in her individual
15 capacity and in her capacity as the legal
16 representative of the ESTATE OF LASANTHA
17 WICKREMATUNGE,

18 *Plaintiff,*

19 v.

20 NANDASENA GOTABAYA RAJAPAKSA,

21 *Defendant.*

Case No. 2:19-cv-02577-R-RAO

22 **DEFENDANT'S NOTICE OF**
23 **MOTION AND MOTION TO**
24 **STAY CASE; MEMORANDUM**
25 **OF POINTS AND**
26 **AUTHORITIES**

27 *[Declaration of Malinda*
28 *Seneviratne and Proposed Order*
submitted concurrently herewith]

Date: September 23, 2019

Time: 10:00 am

Location: Courtroom 850, Roybal
Federal Building and U.S.

Courthouse

Judge: Hon. Manuel L. Real

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Attorneys for Defendant
Nandasena Gotabaya Rajapaksa

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 Please take notice that on Monday, September 23, 2019 at 10 am, or as soon
3 thereafter as this matter may be heard, in the courtroom of the Honorable Manuel L.
4 Real, Courtroom 850, 8th Floor, Roybal Federal Building and U.S. Courthouse, 255 East
5 Temple Street, Los Angeles, CA 90012, Defendant Nandasena Gotabaya Rajapaksa will
6 and hereby does move the Court for an order immediately staying this case pending Sri
7 Lanka's presidential election, and, if Defendant is elected president, until he assumes
8 office.

9 Mr. Rajapaksa's motion is based on this Notice of Motion; the accompanying
10 Memorandum of Points and Authorities; the Declaration of Malinda Seneviratne; the
11 complete files and records in this action; and such other argument or evidence as this
12 Court may consider.

13 This motion is made following the conference of counsel pursuant to L.R. 7-3
14 which took place on August 15, 2019.

15 Dated: August 26, 2019

ARNOLD & PORTER
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18
19 By: /s/ John C. Ulin
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1 **INTRODUCTION**

2 On August 11, 2019, Defendant Gotabaya Rajapaksa was nominated by Sri
3 Lanka’s leading opposition party as its presidential candidate in the upcoming Sri
4 Lankan elections on December 7, 2019. He is widely expected to win the election.
5 This change in circumstances and the legal and foreign-policy issues it raises—
6 including Mr. Rajapaksa’s potential entitlement to head-of-state immunity and the risk
7 that this case will affect a foreign election—dictate an immediate, but brief, stay of the
8 case. Staying this case through the Sri Lankan presidential election, which must be
9 concluded by December 7, 2019, will promote judicial economy, respect principles of
10 international comity, and “secure the . . . inexpensive determination” of this action.
11 Fed. R. Civ. P. 1.

12 If Mr. Rajapaksa wins the Sri Lankan presidential election, as expected, he will
13 be entitled under the common law to absolute “head-of-state” or “status-based,”
14 immunity from suit.. *See Doğan v. Barak*, __ F.3d __, 2019 WL 3520606, at *4 (9th
15 Cir. Aug. 2, 2019) (recognizing that status-based immunity arises from a foreign
16 official’s status as head of state); *see also Samantar v. Yousuf*, 560 U.S. 305, 311-12 &
17 n.6 (2010) (explaining that, under the common law, “officials qualifying as the ‘head
18 of state’ could claim immunity on that basis”). Where head-of-state immunity applies,
19 the court must dismiss the suit. *See Manoharan v. Rajapaksa*, 711 F.3d 178, 179-80
20 (D.C. Cir. 2013) (affirming dismissal based on the determination that “President
21 Rajapaksa, as the sitting head of a foreign state, enjoys head of state immunity from
22 the jurisdiction of U.S. courts in light of his current status”). The most practical and
23 efficient way forward is therefore to stay this case immediately because any further
24 briefing or other proceedings in the interim will be mooted and wasteful if Mr.
25 Rajapaksa is elected President of Sri Lanka.

26 In addition, principles of international comity strongly support a stay. As the
27 Supreme Court has counseled, “[c]omity refers to the spirit of cooperation in which a
28 domestic tribunal approaches the resolution of cases touching the . . . interests of other

1 sovereign states.” *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for*
2 *the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987). Staying this case would respect
3 the interests of Sri Lanka and its people to hold a free, fair, and democratic election
4 without undue interference arising from litigation in a foreign country against a leading
5 candidate in the presidential election. But Plaintiff appears to want the opposite.
6 Having waited a decade to file this lawsuit until just after it became apparent Mr.
7 Rajapaksa intended to run for president, it appears that Plaintiff intends her lawsuit to
8 influence Sri Lanka’s elections.¹ Were the roles reversed, the United States surely
9 would expect a foreign government to abstain from conduct that would likely interfere
10 in an American election. Principles of comity dictate that Plaintiff not be permitted to
11 succeed in that strategy.

12 A brief stay would not prejudice Plaintiff. Rather, should Mr. Rajapaksa lose
13 the election, this case may proceed on close to the same timing that it is now
14 proceeding. But an electoral victory for Mr. Rajapaksa will end this case. Any
15 litigation in the meantime would therefore impose unnecessary burdens on the Court
16 and the parties.

17 Accordingly, Defendant respectfully requests that this Court briefly stay this
18 matter until Sri Lanka’s election concludes in early December and, if Mr. Rajapaksa is
19 elected, until he takes office in early January 2020—at which point the case would
20 have to be dismissed.

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24 ¹ Plaintiff also coordinated with a different party to serve Mr. Rajapaksa at the
25 same time that Plaintiff did. The plaintiffs in the related case have filed a materially
26 identical lawsuit against Mr. Rajapaksa asserting similar causes of action arising out of
27 similar alleged actions Mr. Rajapaksa took while serving in his official capacity in the
28 Sri Lankan government. *See Roy Samanthanam, et al. v. Nandasena Gotabaya Rajapaksa*, No. 2:19-cv-2626-JFW (C.D. Cal.). This appears to be a coordinated effort to interfere in Sri Lanka’s election.

1 **LEGAL STANDARD**

2 A district court “has broad discretion to stay proceedings as an incident to its
3 power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997)
4 (citing *Landis v. North Am. Co.*, 299 U.S. 248 (1936)). When considering whether to
5 stay proceedings, courts consider (1) the possible damage that may result from
6 granting a stay; (2) the hardship or inequity that a party may suffer if required to go
7 forward; and (3) the orderly course of justice, measured in terms of whether issues,
8 proof, and questions of law would likely be simplified or complicated. *Lockyer v.*
9 *Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

10 **BACKGROUND**

11 Mr. Rajapaksa served as Secretary to the Sri Lankan Cabinet Ministry of
12 Defence, Public Security, Law and Order until January 2015. Plaintiff alleges that in
13 that capacity and under Sri Lankan law, Mr. Rajapaksa authorized Sri Lanka’s military
14 forces to perform, or failed to prevent them from performing, various acts that Plaintiff
15 believes violate the Torture Victim Protection Act of 1991 (“TVPA”), 28 U.S.C
16 § 1350 note, and the Alien Tort Statute, 28 U.S.C. § 1350.

17 On August 11, 2019, Mr. Rajapaksa became the presidential candidate for the
18 Sri Lanka Podujana Peramuna party, one of Sri Lanka’s major political parties. *See*
19 Seneviratne Decl. ¶¶ 3, 6. Mr. Rajapaksa is likely to win the upcoming presidential
20 election. *Id.* ¶ 9, 10, 13. Under Sri Lankan law, the presidential election must be held
21 no later than December 7, 2019, and the winner will take office in early January 2020.

22 **ARGUMENT**

23 **I. Defendant’s Election as President of Sri Lanka Would Require Dismissal of**
24 **This Case**

25 An immediate stay of this case until the conclusion of Sri Lanka’s December 7,
26 2019 presidential election and, if Mr. Rajapaksa wins, until he assumes office in
27 January 2020—a modest hiatus by any measure—is a fair and practical path forward
28 that will not prejudice Plaintiff, will prevent equitable hardships that Mr. Rajapaksa

1 would suffer if required to litigate now, and will promote judicial economy by
2 simplifying the issues to be resolved after the stay.

3 Under long-settled principles of common law, foreign heads of state enjoy
4 absolute immunity from suit in U.S. courts. *See Manoharan*, 711 F.3d at 179-80;
5 *Yousuf v. Samantar*, 699 F.3d 763, 768-69 (4th Cir. 2012); *Habyarimana v. Kagame*,
6 696 F.3d 1029, 1032 (10th Cir. 2012); *Weiming Chen v. Ying-jeou Ma*, No. 12-cv-
7 5232, 2013 WL 4437607, at *2-3 (S.D.N.Y. Aug. 19, 2013). Here, Mr. Rajapaksa is
8 the nominee of a major political party and the leading candidate in Sri Lanka's
9 presidential election. Should the Sri Lankan people elect him to that office on
10 December 7, 2019, he will become Sri Lanka's head of state and will be immune from
11 suit in U.S. court.² Indeed, in recent years, federal courts have dismissed lawsuits
12 against the then-sitting president of Sri Lanka that were substantially similar to this one
13 for this very reason. *See Manoharan*, 711 F.3d at 178; *Devi v. Rajapaksa*, No. 11 Civ.
14 6634, 2012 WL 3866495, at *1 (S.D.N.Y. Sept. 4, 2012).

15 It is irrelevant that the allegations in the First Amended Complaint refer to
16 conduct that purportedly occurred *before* Mr. Rajapaksa would assume head-of-state
17 status. Unlike conduct-based immunities, status-based immunities are absolute: they
18 depend on the foreign official's status, not on the nature of the alleged conduct. *In re*
19

20 ² If elected president, Mr. Rajapaksa's entitlement to head-of-state immunity
21 would not depend on whether the State Department issued a suggestion of immunity in
22 this case. Even absent a suggestion of immunity, the Court would have to analyze the
23 common-law principles independently and determine for itself whether Mr. Rajapaksa
24 is entitled to absolute immunity as Sri Lanka's head of state, which he surely would
25 be. *Samantar*, 560 U.S. 305, 311-12 (discussing the two-step analysis for foreign
26 official immunity); *Doğan*, 2019 WL 3520606, at *4 (finding former Israeli Prime
27 Minister Ehud Barak immune from suit both as the result of a suggestion of immunity
28 and under the Court's own independent analysis). That said, it bears emphasis that the
State Department has twice issued suggestions of immunity for Sri Lankan heads of
state in recent years, and, if it were to do so again here, this Court would have to
surrender jurisdiction and dismiss Plaintiff's lawsuit. *See infra*.

1 *Terrorist Attacks on Sept. 11, 2001*, 122 F. Supp. 3d 181, 185 (S.D.N.Y. 2015)
2 (explaining that “[s]tatus-based immunities enable certain incumbent foreign officials
3 to perform their duties unencumbered by legal proceedings,” whereas “[c]onduct-
4 based immunities shield individuals from legal consequences for acts performed on
5 behalf of the state during their tenure in office” (quotation marks omitted)). Thus, a
6 case against a sitting head of state must be dismissed regardless of the specific facts
7 plaintiff alleges or the theories of liability she asserts.

8 Under these circumstances, a brief litigation stay is appropriate for three
9 reasons. *First*, a stay would enhance the orderly course of justice by simplifying the
10 issues for this Court to determine. If Mr. Rajapaksa becomes president of Sri Lanka,
11 long-established principles of head-of-state immunity will require dismissal of the suit.
12 But if this Court resolves the pending motion to dismiss and moves forward to a
13 decision, it will have to decide complicated questions of constitutional and
14 international law that may be mooted in a few months. Thus, a brief stay will promote
15 judicial economy and may provide a straightforward legal basis on which to efficiently
16 and effectively dispose of this case.

17 *Second*, a stay pending Sri Lanka’s election would not prejudice Plaintiff, who
18 concedes that the relevant conduct alleged in the First Amended Complaint occurred
19 over a decade ago, in 2009. First Amended Compl., ECF No. 23 ¶ 1. Plaintiff did not
20 initiate this lawsuit until April 2019. ECF No. 1. Having waited a decade to sue,
21 Plaintiff cannot plausibly argue that a three- or four-month stay—one that would
22 indisputably preserve judicial economy—pending Sri Lanka’s election would cause
23 her harm. *See Gallion v. Chart Commc’ns Inc.*, 287 F. Supp. 3d 920, 932 (C.D Cal.
24 2018) (holding that a brief stay does not prejudice a plaintiff). And if Mr. Rajapaksa is
25 not elected president, then this Court can lift the stay and the case can proceed.

26 *Third*, Mr. Rajapaksa would experience undue hardship and inequity if required
27 to litigate a case in a U.S. court during the final period leading up to Sri Lanka’s
28 presidential election. He is fully committed to a national election campaign, on which

1 he will spend virtually every waking hour until December 7, 2019. It would be unfair
2 to divert Mr. Rajapaksa from the election campaign to participate in this case,
3 particularly when he might receive absolute immunity from suit in just a few short
4 months.

5 Further, because no scheduling order has been issued, discovery will not close
6 and summary judgment or trial certainly will not occur prior to this year's election.
7 Consequently, if Sri Lanka's people elect Mr. Rajapaksa to the office of president, the
8 parties will have to supplement any briefing already filed in connection with the
9 pending motion to dismiss, ECF No. 42, to address the issue of head-of-state immunity
10 or file new motions altogether. For these reasons, proceeding in this case in its current
11 posture would be a wasteful exercise for this Court and for the parties. Rather, the
12 most fair, economical, and prudent course is to stay the case immediately, but briefly,
13 until after the election so that the parties can streamline briefing and the Court may
14 focus on the dispositive legal issues.

15 **II. Principles of International Comity Counsel in Favor of a Stay**

16 International comity offers an additional reason to stay the case briefly. Foreign
17 elections are uniquely sovereign acts, and a brief stay of a case that otherwise might
18 affect or interfere in a foreign election is necessary to respect the sovereignty of a
19 foreign nation.

20 "International comity is a doctrine of prudential abstention." *Mujica v. AirScan*
21 *Inc.*, 771 F.3d 580, 598 (9th Cir. 2014). It is designed to "maintain[] amicable working
22 relationships between nations, a shorthand for neighbourliness [*sic*], common courtesy
23 and mutual respect." *Id.* (quoting *JPMorgan Chase Bank v. Altos Hornos de Mexico,*
24 *S.A. de C. V.*, 412 F.3d 418, 423 (2d Cir. 2005)). The principles underlying
25 international comity weigh in favor of a stay pending Sri Lanka's presidential election
26 for two primary reasons.

27 The election of a head of state is a sovereign and official act that deserves the
28 respect of the international community. Actions taken by the United States' executive,

1 legislative, or judicial branches that might appear to interfere, or *permit* interference,
2 with such a sovereign act may have political and diplomatic repercussions. Indeed, the
3 current dialogue in the United States demonstrates the sensitivity of allegations
4 regarding foreign interference in the electoral process.

5 Whatever Plaintiff’s intentions, this lawsuit has created a media circus in Sri
6 Lanka arising out of this lawsuit.³ Many outlets in Sri Lanka’s national media have
7 reported Plaintiff’s unverified allegations against Mr. Rajapaksa—which he
8 vehemently denies—as if they were conclusively established. For example, the
9 Sunday Observer, Sri Lanka’s most circulated weekly English-language newspaper,
10 has published articles detailing the allegations with specificity, often in a way that is
11 slanted against Mr. Rajapaksa.⁴ Continued litigation on a motion to dismiss prior to
12 Sri Lanka’s election would only exacerbate this reporting. In the intensity of an
13 election campaign, every action by the Court or the parties in this case will be
14 disseminated, amplified, and potentially distorted in ways that are beyond this Court’s
15 control. This Court could find itself a major factor in a foreign election, potentially
16 even influencing its outcome.⁵

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19 ³ On August 12, 2019, Plaintiff sent a public letter to Sri Lanka’s Prime Minister,
20 stating that “Gotabaya Rajapaksa will never apologize for my father’s murder” and
21 excoriating the Prime Minister for permitting his staff and government to support Mr.
22 Rajapaksa during the election season. Plaintiff’s own public statements show that she
is openly opposing Mr. Rajapaksa’s candidacy.

23 ⁴ See, e.g., Manco Colombage, *From Defamation to Extra-Judicial Killing:*
24 *Lasantha’s daughter escalates civil litigation against Gotabaya*, Sunday Observer,
25 July 28, 2019, <http://www.sundayobserver.lk/2019/04/20/news-features/defamation-extra-judicial-killing-lasantha%E2%80%99s-daughter-escalates-civil/>.

26 ⁵ Moreover, under U.S. law all briefing for a motion to dismiss must assume the
27 truth of the factual allegations. There is real danger that Mr. Rajapaksa’s opponents
28 will mischaracterize his legal arguments at the motion to dismiss stage as concessions
of the underlying facts. Activity in this Court could mislead, or could be used to
mislead, members of the Sri Lankan electorate as they head to their polling stations.

1 In addition, a temporary stay pending an election is a familiar course of action
2 for federal courts. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). It is beyond
3 question that each U.S. state has a “compelling interest in preserving the integrity of its
4 election process,” *id.*, and by logical extension foreign states have a materially
5 identical interest. Comity obliges respect for this interest and dictates a stay of this
6 case until the election concludes.

7 Moreover, Plaintiff’s delay in bringing this action counsels in favor of a stay
8 pending the election. Plaintiff waited nearly a decade to bring this action from the
9 time her claims accrued, filing her suit, coincidentally or not, just after it became
10 apparent that Mr. Rajapaksa would likely be a presidential candidate. The Court
11 should consider this delay in assessing the appropriateness of a temporary stay pending
12 Sri Lanka’s election.

13 Federal courts should avoid entanglement in electoral politics, where they
14 cannot fully anticipate or control the ramifications of their actions. That is especially
15 true in the context of a foreign country’s politics. The potential consequences of any
16 other course counsel staying this litigation as a matter of international comity. Doing
17 so will promote the democratic right of Sri Lanka’s electorate to choose a candidate
18 without the interference of publicity surrounding unproven allegations asserted in a
19 foreign court.

CONCLUSION

For these reasons, Defendant respectfully requests this Court to temporarily stay this case pending Sri Lanka’s presidential election, and, if Defendant is elected president, until he assumes office.

Dated: August 26, 2019

ARNOLD & PORTER
KAYE SCHOLER LLP

By: /s/ John C. Ulin
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Robert N. Weiner*
Raul R. Herrera*
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CERTIFICATE OF SERVICE

I certify that on August 26, 2019, I electronically filed the foregoing **DEFENDANT’S NOTICE OF MOTION AND MOTION TO STAY; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MALINDA SENEVIRATNE; AND PROPOSED ORDER** with the Clerk by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Maria Hansen

Maria Hansen

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