No. 20-730

In the Supreme Court of the United States

LINDSAY R. COOPER, ET AL., PETITIONERS

v.

TOKYO ELECTRIC POWER COMPANY HOLDINGS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred in ruling that the district court had not abused its discretion in its fact-bound determination that, under the Ninth Circuit's decision in *Mujica* v. *Airscan, Inc.*,771 F.3d 580 (9th Cir. 2014), *cert. denied*, 577 U.S. 1049 (2015), international comity warranted dismissal of petitioners' claims against TEPCO.

RULE 29.6 STATEMENT

Respondent General Electric Company has no parent company. No publicly held corporation owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–40a) is reported at 960 F.3d 549. The opinion of the district court (Pet. App. 41a–80a) is unreported.

JURISDICTION

The court of appeals entered judgment on May 22, 2020. Pet. App. 1a. The court denied a timely rehearing petition on July 1, 2020. Pet. App. 81a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Almost exactly a decade ago, a tsunami of historic proportions ravaged Japan's eastern seaboard, causing severe damage to the Fukushima Nuclear Power Plant, a nuclear power plant owned and operated by respondent Tokyo Electric Power Company Holdings Inc. ("TEPCO"). Several years after the accident—and two years after filing suit against TEPCO—petitioners brought suit against General Electric Co. ("GE"). Despite the fact that Japan's Act on Compensation for Nuclear Damage ("Compensation Act") channels all liability for injuries suffered as a result of such an incident to the oper-

ator of the nuclear plant (i.e., TEPCO), and despite the availability of multiple avenues to pursue compensation from TEPCO in Japan, petitioners sought to hold GE liable in the Southern District of California for a variety of injuries and illnesses that they allegedly suffered as a result of exposure to radiation from the FNPP, on the theory that GE defectively designed and manufactured the FNPP's nuclear reactors decades ago.

After many years of protracted litigation, the Ninth Circuit issued a well-reasoned opinion holding that, under California's choice-of-law principles, the liability-channeling provision of Japan's Compensation Act applies to petitioners' claims against GE and compels dismissal. Petitioners do not challenge that aspect of the decision below. In fact, aside from a fleeting reference in its recitation of the procedural history, the petition does not mention GE at all. Accordingly, the petition must be denied as to GE.

The Ninth Circuit also dismissed claims against TEPCO on the ground that international comity favored adjudication of those claims in Japan. That dismissal is the subject of the petition. While petitioners' various criticisms of the Ninth Circuit's international comity analysis have no bearing on the court's dismissal of claims against GE, GE agrees with TEPCO that those issues do not warrant this Court's review, for the reasons set forth in TEPCO's brief in opposition.

A. Factual background

The Fukushima Nuclear Power Plant ("FNPP") is a nuclear power plant on Japan's eastern coast, owned and operated by TEPCO. GE was involved in the design of the nuclear plant in the 1960s. See C.A.E.R. 1841. The Japanese government approved the FNPP's design and has regulated the FNPP since its construction decades ago. Since the commissioning of the FNPP's reactors in

the 1970s, TEPCO has been the plant's sole licensed operator. See C.A.E.R. 958.

On March 11, 2011, an underwater earthquake triggered a massive tsunami that overwhelmed Japan's tsunami defenses along its entire eastern seaboard. C.A.E.R. 5. The FNPP suffered extensive flooding and power outages that severely damaged its reactors. The Japanese government was heavily involved in the measures taken at the FNPP as the accident developed. See generally C.A.E.R. 1220–1303. Among other things, the government made critical decisions about the manner and timing of defensive measures taken (or not taken) at the FNPP. The government also promulgated evacuation orders, determined the size of the evacuation zones, and decided when to lift the evacuation orders. See, *e.g.*, C.A.E.R. 1265. In the years since the accident, the Japanese government has also conducted extensive investigations into the cause of the FNPP accident.

The Japanese government has long operated on the understanding that Japanese law—specifically, Japan's Compensation Act—channels all liability to TEPCO. Enacted in the 1950s, the Compensation Act aims to encourage participation in and development of Japan's nuclear industry by companies while ensuring the availability of compensation for persons injured by the operation of a nuclear power plant. C.A.E.R. 905. The Act does so by channeling liability for nuclear damage exclusively to the licensed operator of a nuclear installation. C.A.E.R. 907. In other words, the Compensation Act is Japan's corollary to the U.S. Price-Anderson Act, which similarly channels financial responsibility for nuclear accidents to the nuclear facility's operators. 42 U.S.C. § 2210; see *Rainer* v. *Union Carbide Corp.*, 420 F.3d 608, 624 (6th Cir. 2005).

The Japanese government has therefore guaranteed TEPCO's ability to make payments required by the Act

by providing more than $100 billion in financial security. See *Cooper* v. *TEPCO*, 166 F. Supp. 3d 1103, 1135 (S.D. Cal. 2015), *aff'd*, 860 F.3d 1193 (9th Cir. 2017); C.A.E.R. 602. Consistent with the Compensation Act, in the eight years since the FNPP accident, TEPCO—with the assistance of the Japanese government—has paid many tens of billions of dollars in compensation to individuals and businesses affected by the FNPP accident, and continues to do so. See *Records of Applications and Payouts for compensation of Nuclear Damage*, TEPCO, https://bit.ly/3dnIBia (last updated Feb. 19, 2021) (indicating that TEPCO had paid more than 9.7 trillion yen—nearly $92 billion—in compensation).

B. Proceedings below

1. On December 21, 2012, petitioners filed this action against TEPCO only. C.A.E.R. 2088. After petitioners amended their complaint to name 200 Doe defendants, the district court dismissed the first amended complaint under the political question doctrine. C.A.E.R 2094. Petitioners filed a second amended complaint, again asserting claims against TEPCO and 200 Doe defendants. Dist. Ct. Dkt. 50. The second amended complaint alleged that TEPCO was negligent and strictly liable with respect to the FNPP's siting, design, construction, and operation. TEPCO moved to dismiss the second amended complaint.

While TEPCO's motion to dismiss was pending, petitioners requested leave to name GE and three other manufacturers as defendants, contending that they had only recently learned of GE's alleged involvement with the FNPP. Dist. Ct. Dkt. 65. The district court granted in part and denied in part TEPCO's motion to dismiss, *Cooper* v. *Tokyo Electric Power Co.*, 2014 WL 5465347 (S.D. Cal. Oct. 28, 2014), and gave petitioners leave to amend yet again, including to identify GE and the other manufacturers as defendants. *Id.* at *19.

Petitioners then filed a third amended complaint, this time naming as defendants TEPCO, GE, three other manufacturers, and 196 still yet-to-be-identified Doe defendants, and asserting claims based on various tort theories. GE and TEPCO separately moved to dismiss. C.A.E.R. 832; C.A.E.R. 370. Among other things, GE argued that Japan's Compensation Act applied to petitioners' claims and compelled dismissal of claims against GE.

Meanwhile, TEPCO sought reconsideration of the district court's partial denial of its motion to dismiss the *second* amended complaint, on the ground that the Ninth Circuit's intervening opinion in *Mujica* v. *AirScan, Inc.*, 771 F.3d 580 (2014), provided a new framework for considering whether international comity warrants dismissal of a case brought in U.S. court. After briefing was complete on the motions to dismiss the *third* amended complaint, the district court granted TEPCO's motion for reconsideration but again denied the motion to dismiss the second amended complaint. *Cooper* v. *Tokyo Electric Power Co.*, 166 F. Supp. 3d 1103 (S.D. Cal. 2015). The district court certified the issues decided in its Amended Order for interlocutory appeal under 28 U.S.C. § 1292(b), *id.* at 1143, and dismissed GE's and TEPCO's motions to dismiss the third amended complaint as moot, Dist. Ct. Dkt. 108.

On June 22, 2017, the Ninth Circuit affirmed the denial of TEPCO's motion to dismiss the second amended complaint. *Cooper*, 860 F.3d at 1218. The Court noted that it was not deciding which law applied, that it had "yet to undergo a choice-of-law analysis," and that "Japanese law" might apply. *Id.* at 1215; see also *id.* at 1210 n.12. The court determined that none of the grounds raised in TEPCO's appeal warranted dismissal at that stage of the proceedings, but noted that "[f]urther developments … may require the district court to revisit some of the issues." *Id.* at 1197; see also *id.* at 1210, 1217, 1218.

On remand, GE and TEPCO filed renewed motions to dismiss the third amended complaint. GE sought dismissal on the ground that, under California choice-of-law rules, Japan's Compensation Act applies and channels all liability to TEPCO, the FNPP's operator. C.A.E.R. 855–67. GE also argued that the third amended complaint presented a political question, and that most of petitioners' claims were time-barred or failed for additional claim-specific reasons. C.A.E.R. 873–92. GE further argued for dismissal on the grounds of *forum non conveniens*, lack of subject-matter jurisdiction, and international comity, C.A.E.R. 853–55, 867–73, 892. TEPCO sought dismissal on the basis of lack of personal jurisdiction, international comity, *forum non conveniens*, and for other claim-specific reasons. See C.A.E.R. 382–83.

2. The district court granted both motions on March 4, 2019. As to GE, the district court concluded that it had subject-matter jurisdiction to hear petitioners' claims, Pet. App. 45a, but held, after conducting a choice-of-law analysis under California's governmental-interest test, that Japanese law applied and channels all liability for injuries caused by the FNPP accident to TEPCO, Pet. App. 59a, 61a-62a. Because it "agree[d] with GE that Japanese law applies" and bars petitioners' claims, the district court did not address GE's other arguments for dismissal. Pet. App. 42a n.2.

The court also granted TEPCO's motion to dismiss, holding that dismissal of petitioners' claims against TEPCO was appropriate as a matter of international comity. Pet. App. 77a.

3. The Ninth Circuit affirmed. With respect to GE, the court began by noting that it was undisputed that, if Japan's Compensation Act applies, petitioners' claims had to be dismissed because the Act makes TEPCO exclusively liable for any damages caused by the FNPP

accident. Pet. App. 8a. The court rejected petitioners' argument that the Compensation Act's channeling provision is procedural, rather than substantive, and therefore not subject to a choice of law analysis. Pet. App. 10a-11a. The court noted that liability-limiting provisions are treated as substantive under California law and are routinely subject to choice of law analysis. Pet. App. 11a. The court also rejected petitioners' argument that it was inappropriate for the district court to conduct a choice-of-law analysis at the motion-to-dismiss stage, because the district court here "had all the argument and facts necessary to make its decision." Pet. App. 12a.

On the substance of the choice-of-law analysis, the court conducted a California governmental-interests analysis and concluded, like the district court, that "Japanese law applies to the claims against GE." Pet. App. 24a.

The court determined that there is a "true conflict" between California law and Japan's Compensation Act. It was undisputed that the laws of California and Japan differ on the question of GE's potential liability. Pet. App. 14a-15a. And both California and Japan had "legitimate interests" in having their law applied to the case. Pet. App. 16a-19a. The court further determined, at the "comparative impairment" step of the California choice-of-law analysis, that Japan's interests would be more significantly impaired than California's if its law were not applied. Japan had a significant interest in limiting liability for defendants engaged in the nuclear-power industry in Japan, in order to balance protection for injured parties against the need to encourage participation in the Japanese nuclear power industry. California's general interest under its product liability laws in ensuring compensation for injured residents did not overcome Japan's interest in limiting defendants' substantive liability for injuries occurring within its borders. See Pet. App. 22a-24a. The Ninth Circuit did not reach any of GE's alternative

arguments for affirmance. Pet. App. 24a n.8. The Ninth Circuit separately affirmed the dismissal of petitioners' claims against TEPCO on the ground of international comity. Pet. App. 38a.

The Ninth Circuit denied petitioners' petition for rehearing. Pet. App. 79a-80a. Petitioners' petition for writ of certiorari does not challenge any of the lower courts' findings as to GE or the dismissal of the claims against it.

ARGUMENT

The sole question petitioners present for this Court's review is whether the court below erroneously held that the district court had not abused its discretion in dismissing petitioners' claims against TEPCO on international comity grounds. For the reasons set forth in TEPCO's brief in opposition, GE agrees that this question does not merit this Court's review.

However, regardless of whether petitioners' various criticisms of the Ninth Circuit's application of the international comity doctrine to TEPCO warrant this Court's attention, the petition must be denied as to GE. The sole basis for the dismissal of petitioners' claims against GE in the district court, and the sole basis for affirmance of that decision, was not international comity, but rather the conclusion that, under California's choice-of-law principles, Japan's Compensation Act applies to petitioners' claims against GE and compels their dismissal. See Pet. App. 24a n.8, 42a n.2. The petition nowhere challenges that aspect of the decision below. Petitioners do not mention this choice-of-law issue, much less argue that the Ninth Circuit's decision was wrong and meets the criteria for review by this Court.

Petitioners have therefore waived any challenge to the Ninth Circuit's dismissal of claims against GE. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the

Court."); *Yee* v. *Escondido*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari.").

Waiver aside, the Ninth Circuit correctly concluded that Japanese law governs petitioners' claims against GE. First, petitioners have never disputed that California's choice-of-law test applied to determine whether Japan's Compensation Act governed their claims. Second, petitioners also did not dispute the elements of California's choice-of-law test for tort claims or that California and Japanese law conflict. Third, because petitioners' claims would set design and operational standards for nuclear power plants located in Japan and impede Japan's comprehensive statutory scheme for, and government response to, a nuclear accident occurring on its soil, the Ninth Circuit properly held that Japan has a far greater interest than California in the application of its law to petitioners' claims.

Even beyond petitioners' waiver and that the lower court correctly stated and applied settled law, the Ninth Circuit's fact-intensive application of California's choice-of-law principles to conclude that Japanese law applied and mandated dismissal of petitioners' claims against GE presents no question that would warrant this Court's review. See *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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